In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1278

CLARK COUNTY, NEVADA,
Petitioner,

vs.

ARBY W. ALPER AND RUTH ALPER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. WHIPPLE
Deputy District Attorney
Clark County Courthouse
200 East Carson Avenue
Las Vegas, Nevada 89101
Counsel for Petitioner

GEORGE E. HOLT
District Attorney
Clark County Courthouse
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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CLARK COUNTY, NEVADA,
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ARBY W. ALPER AND RUTH ALPER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

TO the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner CLARK COUNTY, NEVADA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada entered in this proceeding on November 17, 1977 under docket number 8412 and preliminarily reported at 93 Nev. Advance Opinion 195.

OPINIONS BELOW

The order and judgment of the Trial Court, Case No. A77807 entered and filed on June 5, 1975 appears at Appendix A.

The judgment and opinion of the Supreme Court of Nevada appears at Appendix B.

The Order of the Supreme Court of Nevada denying rehearing entered December 15, 1977 appears at Appendix C.

JURISDICTION

The Supreme Court of the State of Nevada entered judgment on November 17, 1977. Clark County petitioned that Court for rehearing on December 2, 1977 and on December 15, 1977 that timely petition for rehearing was denied.

This petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

(1) Whether a political subdivision (Clark County), even though not generally a *person* under Amendment XIV of the United States Constitution, which is nevertheless an entity capable of suing and being sued, is entitled to procedural due process as a litigant in defending its property rights in an action brought by a private party?

(2) Whether the Supreme Court of Nevada abused the scope of its appellate jurisdiction in making findings on crucial fact-law issues not before the Court on appeal, where there has been no trial on the merits; precluding Clark County from presenting its evidence and raising important defenses; and where such issues were not appealable nor properly before the Court on appeal; thereby

denying Clark County its "day in Court", in violation of its right of procedural due process under Amendment V and Amendment XIV of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved are rights of due process under Amendments V and XIV of the United States Constitution.

STATEMENT OF THE CASE

This is an action in inverse condemnation brought by Arby and Ruth Alper (both referred to herein as "Alper"), versus Clark County, Nevada in the Eighth Judicial District Court of the State of Nevada in Las Vegas.

At issue is a 50′ x 1000′ parcel of land which has been an integral part of a major thoroughfare, namely Flamingo Road, since mid-1967. Title to the property is and has been in Alper.

Alper owned undeveloped real property at the intersection of Las Vegas Boulevard South and Flamingo Road measuring approximately 255′ x 1000′. (Plaintiff's Exhibit 1-A) In November of 1966 Alper leased this property to Bonanza No. 1 for a period ending May 31, 1972. The lease gave the lessee an option to extend the term for an additional 50 years. (Plaintiff's Exhibit 3) Construction of the Bonanza Hotel and Casino was planned using a part of this property on that busy corner. Prior to the lease, Clark County made known its intention to widen Flamingo Road and requested Alper to dedicate the northern 50′ of the property to enable it to do so. Alper refused. (Plaintiff's Exhibits 2, 2-A, 2-B; Alper's deposition p. 135)

In February of 1967, at a regular meeting of the Clark County Commissioners, the Commission considered a request by Bonanza No. 1 for a zone variance for construction of their hotel. The Commissioners conditioned the variance on the obtaining of a public road easement across the northern 50′ of the Alper property which was agreed to by Bonanza No. 1. (Plaintiff's Exhibit 5)

On March 21, 1967, while the lease was in effect, but without the 50 year option having been exercised, Bonanza No. 1, lessee, executed such easement to Clark County for a period of 52 years, to allow the construction of a public road. The easement was recorded on March 22, 1967 and the road was constructed and completed shortly thereafter. (Plaintiff's Exhibits 7-A, 10-A, 10-B)

After Alper expressed concern of a possible loss of title of the parcel by prescription or adverse possession, Clark County's Deputy District Attorney wrote to Alper a letter dated June 19, 1968 (See Appendix G), stating the County would not contend that because of continued use of the parcel as a street that any prescriptive right could be acquired. The adverse possession statute in Nevada is only a 5 year statute.

Bonanza No. 1 filed a proceeding in bankruptcy. On January 16, 1969, the lease between Alper and Bonanza No. 1 was cancelled by mutual consent of the lessor and lessee as a part of a transaction by which Alper sold the remaining property to Tracy Investment Company. Subsequent purchases and development resulted in the location of the MGM Grand Hotel, in part, on this site.

On July 31, 1972, Alper, for the first time, became a party as plaintiff to this litigation. The filing of an Amended and Supplemental Complaint made them plaintiffs in this action against Clark County.

After a series of motions and pre-trial conferences, but no trial, the Eighth Judicial District Court dismissed Alper's complaint against Clark County on the basis that Alper had not filed a claim as required under Nevada Revised Statutes section 244.245 (the claims statute, see Appendix H). The Court dismissed the complaint for want of jurisdiction as a result of Alper's failure to comply with that section holding that the filing of a claim was a condition precedent to maintaining this action. (See Appendix A, Appendix F herein) Alper appealed the Judgment of the Eighth Judicial District Court to the Supreme Court of the State of Nevada. (See Appendix E)

On November 17, 1977, the Supreme Court of the State of Nevada rendered judgment on that appeal and reversed the judgment of the Eighth Judicial District Court, remanding the case for trial on its merits. (See Appendix B)

The Nevada Supreme Court held that the claims statute was unconstitutional as it applies to actions in inverse condemnation.

Unfortunately, the Nevada Supreme Court went on to make apparent findings of fact-law issues not before the Court on appeal.

For that reason, Clark County filed a petition for rehearing on December 2, 1977, alleging it had been denied its constitutional right of procedural due process by the findings of the Supreme Court on fact-law issues which were not before the Court on appeal, and had been denied "its day in Court". (See Appendix D)

The Supreme Court of the State of Nevada denied that petition for rehearing without comment on December 15, 1977. (See Appendix C)

REASONS FOR GRANTING THE WRIT

I

The Decision Below Gives Rise to a Vital Unsettled Question; Namely, Whether a Local Political Subdivision, Not Generally a "Person" in the Context of the Due Process Clause Under Amendment XIV, Is Nevertheless Entitled to Procedural Due Process As a Party-Litigant.

It is undisputed that a local political subdivision is generally held not to be a "person" for purposes of due process under and through Amendment XIV of the United States Constitution. The question presented for review, however, does not relate to substantive due process rights. Since the protective veil of sovereign immunity has been partially lifted and such political entities are now capable, by legislative fiat, of being sued, the doctrine of fair play in litigation and the fundamental right to have one's "day in Court", requires determination that such entities are entitled to the protection of procedural due process in defending themselves against the actions of private parties.

Local governments must do business with the public in all the ways of a private corporation, but also face the seemingly insatiable demands for services of an expanded populace. They must seek to do business and meet such demands under strict limitations of statutory and constitutional restrictions with limited, often ill-defined powers. Entities must function through the operations of a number of agencies, departments and officers, often headed by independent elected officials. Seldom does one public executive or executive body have the control, access to information, and well defined authority and power to

deal effectively with the variety of business, social and economic problems in the same manner as private corporate enterprise. The functions and processes of government are inherently different. These distinctions have been the basis, in the past, for legitimate legislative and constitutional protections in the form of sovereign immunity.

Courts and legislatures have been fit to abrogate the doctrine of such immunity in many situations. For the most part, a local government entity has been given the legislative power to sue and the responsibility of being sued by private individuals.

Because of its unique structure a public entity is particularly vulnerable to certain kinds of litigation arising in part out of the demands of their public and through the limitations on its power to satisfy public need.

The result is an increasing proliferation of legal actions against such local governments.

There is a tendency for legislatures who have created such entities and even for the courts of the state, upon occasion, to approach the legal problems of such local governments with a highly paternalistic attitude. This can take the form of an insidious encroachment upon the procedural fair play doctrines of litigation. It is not suggested that such encroachments are wilful or even recognized by state institutions. It is, however, perhaps easier for the courts to tend to an abuse of jurisdiction when the litigants may be looked upon somewhat as a child or a stepchild of the state. These tendencies may be enhanced by an acceptance of the assumption that such public entities are not entitled to due process under the United States Constitution.

Nevertheless, once a county or city has the power to sue or be sued as a party litigant, it should be entitled

to the same fundamental protection of any litigant as embodied in the concepts of fair play and should be entitled to its day in court. To deny such entities procedural due process could lead potentially to the obvious horrible result of having two classes of litigants. In the oft-quoted words of Daniel Webster, all litigants should be entitled to proceed under "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." (From argument in *Dartmouth College* v. *Woodward*, 4 L.Ed. 627).

The question of whether or not such entities are clearly entitled to such procedural due process under the United States Constitution appears not to have been decided. There has been a scattering of cases where courts have held that such due process is essential. See *School District No. 23* v. *Planning Committee*, 361 P.2d 360 (Colo. 1961); *Nelson* v. *Garland*, 187 A. 316 (Pa. 1936); *Mensik* v. *Smith*, 166 N.E.2d 265 (Ill. 1960); *Township of Middletown* v. *Institution District*, 293 A.2d 885 (Pa. 1972); and *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684 (Cir. 2, 1968).

American appellate courts are now faced with the review of an ever-increasing number of decisions involving actions against local governmental entities. It is essential that such public entities be assured of the right to raise all their defenses, present their evidence and have their day in court. The resolution of this issue is of increasing national importance.

II

The Decision Below Is a Classic Case of Abuse of Appellate Jurisdiction Which Effectively Denies Clark County Its Day in Court on Crucial Issues of Fact and Precludes It From Raising Legitimate Defenses in a Trial on the Merits.

The denial of a litigant of its day in court and of the opportunity to raise all of its defenses is so fundamental that it cries out to this Honorable Court for relief.

After only pre-trial argument and briefing, the Trial Court reached certain conclusions resulting in a dismissal of plaintiff's complaint for want of jurisdiction. (See Appendix A herein)

Although under these circumstances no conclusions of law or findings of fact were required, the Trial Court constrained to record its pre-trial findings. It has been consistently held that a dismissal for want of jurisdiction precludes the court from making a determination on the merits. Having made a finding of failure of jurisdiction, any findings of fact and conclusions of law relating to the merits of the action were of no force and effect.

The only appealable issue was the order and judgment of the Trial Court (Appendix A), which dismissed Plaintiff's complaint for want of jurisdiction. Interlocutory findings of fact and conclusions of law were not in any sense appealable by Clark County, even on cross-appeal.

The Supreme Court of Nevada, in reversing the Trial Court's judgment of failure of jurisdiction and remanding for trial on the merits, did not limit itself to that single appealable issue.

The Supreme Court of the State of Nevada went further, in an abuse of its appellate jurisdiction, to make comments, statements and conclusions (some seeming to confirm and some overruling conclusions of the Trial Court), which have the effect of precluding Clark County from raising certain essential defenses on remand in a trial on the merits and indeed have spoken so as to make certain conclusions to be the *law of the case*. This leaves Clark County with little to try on remand except the issue of valuation of the property in question.

Specifically, the Trial Court, in order to determine that the claims statute was a condition precedent to suit and to rule on the effect of the failure to file such a claim would and did find it necessary to conclude that a "taking," occurred on a certain date. Such an interlocutory finding is not unusual in such circumstances; for example, where a court is seeking to rule on a motion for summary judgment where the court may take plaintiff's allegations in their most favorable light before ruling on a defense motion.

The Supreme Court of Nevada, in commenting, seems to tend to confirm that conclusion and the date of taking.

More importantly, the Supreme Court of the State of Nevada chose to decide the issue of whether or not Clark County might raise as a defense the various statutes of limitation, other than and aside from, the so-called claims statute.

On page 5 of its opinion (Appendix B herein), the Supreme Court of Nevada quotes partially from Clark County's letter of June 19, 1968, and reaches a conclusion that there has been an "avoidance" of the statutes of limitation.

The position of Clark County is clear that it is using the parcel of property in question under a grant in easement. Under those circumstances there could be no taking. Clark County should be entitled in a trial on the merits to present its evidence as to the manner and circumstances under which it entered into the property under a grant in easement, the effect of that easement and the effect of the voluntary termination of the lease on the easement. Even if a conclusion of a "taking" should be reached in a trial on the merits, Clark County should have the *opportunity to raise all of its defenses*, including the statutes of limitation in that trial.

The Trial Court, in its interlocutory findings, found that Clark County's letter of June 19, 1968, did not waive any of its defenses, saying in its statement from the bench,

> "I don't view the letter of Mr. Bartley as an intention to waive or as in any way to give the impression to the Alpers that the County was waiving its right under the non-claims statute.
>
> "The Alpers were not led into a sense of false security. The Bartley letter was intended to do exactly that which it said it was doing.
>
> "They were waiving any claim for prescriptive easement. It has nothing to do with whether or not the Alpers have a claim for inverse condemnation, and whether they are going to assert that claim they have to file a notice of claim with the County in the period limited by 244.245." (See Appendix F)

Mr. Justice Holmes, speaking for the Court in *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 said,

> "Whatever disagreement there may be as to the scope of the phrase 'due process law,' there can be no doubt

that it embraces the fundamental conception of a fair trial, with opportunity to be heard."

To deny Clark County the opportunity to be heard on all of the facts and circumstances giving rise to the letter and bearing upon its interpretation and to deny Clark County the right to present its evidence of all the facts and circumstances surrounding its entering into the property under a grant in easement is to effectively deny Clark County its day in court.

The Supreme Court of Nevada, in abusing its appellate jurisdiction, has sought to decide issues of fact and law which effectively preclude Clark County of trying these vital issues and raising its vital defenses. Such an abuse of jurisdiction has effectively precluded Clark County from trying its case and is a violation of procedural due process under Amendment V and Amendment XIV of the Constitution of the United States.

Although it is understood that appellate courts, in the interest of judicial economy, have the discretion to speak to collateral issues of law and review the record on certain issues of fact where all the evidence is before the court on appeal, such discretion provides no excuse for such an abuse of jurisdiction where there has not been a trial or an evidentiary hearing on fundamental issues and defenses.

When a state has made a political subdivision subject to suit by private parties, that entity should be entitled to the full panoply of procedural due process rights of any litigant.

A grant of certiorari to review the decision below is justified in that it would enable the United States Supreme Court to resolve important constitutional questions involving broad practical consequences in litigation generally; especially litigation involving local political subdivisions as defendants against private parties.

III

A Substantial Federal Question Has Been Preserved and Although Further Proceedings Are to Be Had in the Trial Court, There Has Been a Final Adjudication of the Question Presented for Review.

(A) The questions presented for review concern a violation of fundamental rights of procedural due process under Amendment V and Amendment XIV. Those violations did not appear until the rendering of judgment and opinion by the Supreme Court of the State of Nevada. Clark County raised the issue by a timely petition for rehearing to that Court. That petition was denied. No other remedy was available.

(B) Although the Supreme Court of Nevada has remanded the cause for trial on the merits, there has been a final adjudication of the due process issues presented herein for review.

Under the doctrine of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the federal question has become final, even though there will be further proceedings in the Trial Court since, (1) no further federal questions remain to be decided at the trial level for possible further review; and (2) the federal issue is conclusive and the outcome of further proceedings is preordained since the Nevada Supreme Court has, by deciding in advance of trial, basic issues relevant to Clark County's defenses and left little to be tried below other than issues of valuation.

It is respectfully submitted that the federal questions have thus been preserved, and that there has been a final

adjudication on those issues. Indeed, a later petition for review on these issues would not be timely since the decisions creating the due process violations are and will continue to be beyond further appeal in Nevada courts.

CONCLUSION

The questions presented are of broad public interest; especially in litigation involving private parties versus counties and cities. At issue are basic concepts of justice and fair play fundamental to the right of procedural due process.

Review would serve to clarify existing doubt and mistaken assumptions in local government litigation. Such clarification would be in the public interest.

WHEREFORE, for these reasons, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

MELVIN R. WHIPPLE
Deputy District Attorney
Clark County Courthouse
200 East Carson Avenue
Las Vegas, Nevada 89101
Counsel for Petitioner, Clark County, Nevada

GEORGE E. HOLT
District Attorney
Clark County Courthouse
Of Counsel

APPENDIX

APPENDIX A

CASE NO. A 77807

DEPT. NO. 1

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

ARBY M. ALPER and RUTH ALPER,
Plaintiffs,

vs.

COUNTY OF CLARK,
Defendant.

ORDER AND JUDGMENT DISMISSING COMPLAINT AGAINST CLARK COUNTY

(Filed June 5, 1975)

Defendant Clark County's motion to amend its answer having duly come on for rehearing on May 28, 1975, the court having read and considered the points and authorities filed by the parties and heard the argument of counsel, and it appearing to the court that the failure of the plaintiffs to file a claim against the County under NRS 244.245 precluded the commencement of this action, and any order previously entered to the contrary was improvidently entered, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that there is no just reason for delay and that the complaint be, and it hereby is, dismissed, and all orders previously entered inconsistent with this judgment are hereby vacated,

and that defendant recover its costs in the amount of $_____.

June 5, 1975

/s/ J. Charles Thompson
District Judge

Submitted by:

George R. Holt, District Attorney
of Clark County, Nevada

By /s/ Melvin R. Whipple
Attorney for County of Clark
200 E. Carson Ave.
Las Vegas, Nevada 89101

APPENDIX B

93 Nev., Advance Opinion 195

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ARBY W. ALPER AND RUTH ALPER, APPELLANTS,

v. CLARK COUNTY, NEVADA, RESPONDENT.

No. 8412

November 17, 1977

Appeal from an order dismissing an action in inverse condemnation; Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

Reversed and remanded for a trial on the merits.

George Rudiak Chartered, Las Vegas, for Appellants.

Robert List, Attorney General, Carson City; *George Holt*, District Attorney, and *Melvin R. Whipple*, Deputy District Attorney, Clark County, for Respondent.

Guild, Hagen & Clark, Ltd., and *Constance L. Howard*, Reno, for Amicus Curiae Nevada Taxpayers' Association.

Lionel Sawyer & Collins and *Steve Morris*, Las Vegas, for Amicus Curiae MGM Grand Hotel, Inc.

OPINION

By the Court, MOWBRAY, J.:

The principal issue presented is whether NRS 244.245[1] and NRS 244.250,[2] the Six Months' Claims Statutes, apply to a claim for damages in an inverse condemnation proceeding brought by a property owner against a county. The district judge, in dismissing the complaint, held the statutes applicable and constitutional. The appellants, Arby W. Alper and Ruth Alper, who commenced this action, have appealed.

1. Appellants acquired in May 1959 a parcel of real property 225 feet wide and 1,000 feet long, located on the south side of Flamingo Road in Clark County. This case is focused on a portion of that property, originally fronting on the south side of Flamingo Road, and now part of that road, measuring about 50 by 1,000 feet. For clarity, this portion shall be referred to as Parcel 1 and the remainder as Parcel 2.

In November 1966, appellants leased both parcels to Bonanza, a Nevada corporation, to be used as a parking

---

[1]NRS 244.245(1):

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

[2]NRS 244.250:

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

lot. The lease was for a term ending in May 1972 with an option to extend for 50 years. Prior to the execution of the lease, respondent, Clark County, requested appellants to dedicate Parcel 1 to the respondent, so that Flamingo could be widened. Appellants refused to do so. In March 1967, as a condition to securing building permits, Bonanza granted a 52-year easement over Parcel 1 to respondent. Construction was begun on Parcel 1 for widening Flamingo Road in May 1967.

Later, Bonanza filed a voluntary petition in bankruptcy in the federal court. During the bankruptcy proceedings in 1967, appellants appeared before the board of county commissioners to protest the improvements on Parcel 1. After a series of conferences, the county authorities wrote to appellants, acknowledging appellants' ownership of Parcel 1 and the limited interest conveyed by their lessee, Bonanza, and promising not to assert any prescriptive rights to the parcel.[3]

Appellants filed the present action on July 31, 1972, without having filed a claim with the county. After a pretrial conference, District Judge J. Charles Thompson dismissed the action. He determined that Parcel 1 was "taken" by respondent as a matter of law in May 1967, that NRS 244.245 did apply to actions for inverse condemnation, that such application was constitutional, and that appellants' failure to satisfy the statute barred the present action.

---

[3]The June 19, 1968, letter to Alper provided in part:

The County further recognizes that you have an underlying fee to the property and the County will not contend that because of the continued use of the property as a thoroughfare that [sic] any prescriptive right to a street easement can be obtained.

Very truly yours,

[signed] James M. Bartley
JAMES M. BARTLEY
Chief Civil Deputy

2. Appellants seek reversal on the principal ground that NRS 244.245 and 244.250, as applied to actions in inverse condemnation, result in an undue restriction on a federally created and protected right that private property shall not be taken for a public use without the payment of just compensation. The right to just compensation for private property taken for the public use is guaranteed by both the United States and the Nevada Constitutions. U.S.Const. amend. V; Nev. Const. art. 1, § 8. These provisions, as prohibitions on the state and federal governments, are self-executing. *See* Wren v. Dixon, 40 Nev. 170, 190-191, 161 P. 722, 728 (1916). The effect of this is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute.

In Alexander v. State, 381 P.2d 780, 782 (Mont. 1963), the court held that compliance with a claim filing statute was not a condition precedent to an action in inverse condemnation, on the ground that such "'constitutional guaranty needs no legislative support, and is beyond legislative destruction'" (quoting McElroy v. Kansas City, 21 F. 257 (C.C.W.D.Mo. 1884)). Similarly, in Hollenbeck v. City of Seattle, 153 P. 18, 19 (Wash. 1915), the court held that, because inverse condemnation was based on a constitutional right, "no notice of the claim was essential nor could it be required."

In Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969), a claim filing statute established by the California Tort Claims Act was held to violate due process as applied to a civil rights action. The United States district court had sustained a motion to dismiss a civil rights complaint against a county sheriff, on the ground that the notice and time requirements of the California Tort Claims Act

were applicable but had not been followed. The California Tort Claims Act waived in certain instances the sovereign immunities of certain public entities, and obligated the public entities to pay judgments rendered against officers and employees acting within the scope of their employment. Cal. Gov't Code § 825 (West 1966) (*amended*, West Supp. 1977). The Act also required that claims of the character asserted in that case be presented to the public entity within 100 days after the accrual of the cause and that the action be commenced within six months after the claim was acted upon. Cal. Gov't Code § 911.2 (West 1966).

In holding that the motion to dismiss should not have been sustained and that there was no necessity of compliance with § 911.2, the Ninth Circuit Court of Appeals noted as follows:

> In California[,] statutes or ordinances which condition the right to sue the sovereign upon timely filing of claims and actions are more than procedural requirements. They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action. When the action is against the public employee rather than the public entity such statutes are given the same effect.
>
> While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions upon them. Were the requirements of the Tort Claims Act nothing more than procedural limitations we would in fashioning the remedial details applicable to the federally created right involved here,

> determine whether the California courts would apply the requirements of the California Tort Claims Act. However[,] since the requirements of that Act, under the interpretations of the California courts, condition the right, we think it would be singularly inappropriate to fashion a federal procedural detail by any reference to it.

Willis v. Reddin, 418 F.2d at 704-705 (footnotes omitted).

Because § 911.2 was a condition on the right to sue, an element of the plaintiff's cause of action and a condition precedent to the maintenance of suit in California law, the Ninth Circuit Court of Appeals refused to apply that section as a bar to suit on a federally created and protected right. *See also* Reed v. Hutto, 486 F.2d 534 (8th Cir. 1973).

In the instant case it is clear that, if applied to actions of inverse condemnation, NRS 244.245 and 244.250 would be conditions on the right to sue. The Fifth Amendment to the United States Constitution states that private property shall not be taken for a public use without the payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment and is applicable to the states by way of the Fourteenth Amendment. To impose a requirement of compliance with our claims statutes would allow a state to impose a precondition to sue on a federally created and protected right. The imposition of such a prerequisite to sue is an impairment of a federal right not countenanced by the ruling of the Ninth Circuit in *Willis*. Consequently, if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such application would, in our opinion, be unconstitutional.

Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right.

3. Respondent contends that, even if the claims statutes are not a bar, this action is foreclosed by the statute of limitations. The trial judge found that the taking occurred on May 8, 1967, and that the action was not commenced until July 31, 1972, over five years later. Respondent argues that NRS 11.190(5)(b), which provides a one-year limitation period for all claims against a county, bars the action. In the alternative, it is suggested that NRS 11.200, which provides a four-year period for all actions otherwise unprovided for, should bar it. *Cf.* Frustuck v. City of Fairfax, 28 Cal. Rptr. 357 (1963).

Here, however, the record shows an avoidance of the statute. The Respondent County, in its letter of June 19, 1968, promised not to assert any prescriptive rights in the property. See footnote 3, *supra*. As a result, the appellants are not now barred from proceeding in the instant case.

We reverse and remand the case for a trial on the merits.[4]

BATJER, C.J., and THOMPSON, GUNDERSON, and ZENOFF, JJ., concur.

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[4]The Chief Justice designated Hon. David Zenoff, Justice (Retired), to sit in this case. Nev. Const. art. 6, § 19.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellant,

vs.

CLARK COUNTY, NEVADA,
Respondent.

ORDER DENYING REHEARING

(Filed December 15, 1977)

Rehearing denied.

It is so ORDERED.

/s/ Batjer, C.J.
Batjer

/s/ Mowbray, J.
Mowbray

/s/ Gunderson, J.
Gunderson

/s/ Manoukian, J.
Manoukian

cc: Hon. J. Charles Thompson, District Judge
Hon. George E. Holt, District Attorney
Melvin R. Whipple, Deputy District Attorney
George Rudiak Chartered, Esq.
Messrs. Lionel Sawyer & Collins
Messrs. Guild, Hagen & Clark, LTD.

APPENDIX D

EXCERPT OF PETITION FOR REHEARING BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellants,

vs.

CLARK COUNTY, NEVADA,
Respondent.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEVADA:

The Respondent CLARK COUNTY, NEVADA, presents this petition for a rehearing of the above cause, and, in support thereof, respectfully shows:

1. The appeal in the cause was argued before this Court on November 8, 1976.

2. On November 17, 1977, this Court rendered its decision in favor of the Appellants and against the Respondent, reversing the order of Judge J. Charles Thompson of Department No. I of the Eighth Judicial District Court.

3. The Respondent seeks a rehearing upon the following grounds:

a. That the Court has overlooked or misapprehended a material matter involved in the appeal.

b. That there exists the necessity for the settlement of important questions of fact and law, and a correction of the judgment will promote substantial justice.

ARGUMENT

The Court has overlooked or misapprehended material matters in the record involving important issues.

A. *The Eighth Judicial District Court heard arguments during a series of lengthy pre-trial conferences, had the benefit of extensive briefing and considered various pre-trial motions.*[1]

There were no evidentiary hearings and no trial of issues of fact.

The pertinent and crucially important procedural aspects of the decision of the Court below can best be described by quoting from Appellants' (Alpers') Opening Brief, at page 2,

> "STATEMENT OF FACTS AND STATEMENT OF THE CASE
>
> The District Court's decision, dismissing this action for non-compliance with NRS 244.245, came during a series of pre-trial conferences lasting several full days. (Transcripts R/A 1917-2652) During such conferences, which involved extensive legal argument on various pre-trial motions, the Court was referred to Rule 36 admissions, Rule 33 answers to interrogatories, documents produced pursuant to Rule 34, and affida-

1. Italics added for emphasis.

> vits and deposition testimony. Exhibits were marked pursuant to stipulation waiving foundation as to some and agreeing to admission of others. In this Statement of Facts and Statement of the Case, we will therefore refer to this evidentiary material as though the Court's decision had been rendered under a Rule 56(c) search of the record, although, as will be seen, in dismissing the action on the ground of non-compliance with the claim statute, the Court acted *sua sponte* without the benefit of a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment."

Speaking from the bench, the Court below indicated that the reason for its judgment of dismissal of Alpers' complaint was a failure of jurisdiction under Rule 12, Nevada Rules of Civil Procedure. (See quote from Reporter's Transcript of proceedings found at Reply Brief of Amicus Curiae MGM Grand Hotel, Inc. at Appendix "G", page 25 of Appendices.)

Therefore, the record shows that the Eighth Judicial District Court acted under Rule 12(h)(3), Nevada Rules of Civil Procedure, declaring that Alpers' failure to comply with NRS 244.245 was a jurisdictional defect. *For want of jurisdiction Alpers' Complaint was dismissed.*

There was no evidentiary hearing on issues of fact. It is clear that where there was a failure of Alpers' action on jurisdictional grounds, there can be no decision on the merits of the case.

The only *issue for appeal* remaining was the issue of whether or not NRS 244.245 applies to an action in inverse condemnation. On appeal, Respondent was precluded from attacking the validity of the findings of fact of the Court below because their effect was nullified by dismissal of the complaint on jurisdictional grounds. Re-

spondent seeks the opportunity to present authority on that principle on Rehearing.

In effect, the Court concluded that if all Plaintiffs-Alpers' allegations were considered in their most favorable light as to Plaintiffs, the complaint must still fail for want of jurisdiction.

County of Clark had no opportunity to present its evidence on such crucial issues as the effect of County's accepting dedication of the street by a grant in easement; all the circumstances leading up to and pertaining to said grant; the question whether or not there was a "taking" of Alpers' property; the circumstances leading up to the delivery of the "County's letter of June 19, 1968" (See Opinion of the Court, page 7) which are pertinent to any interpretation of that letter, and the authority of the writer of that letter to broadly waive any and all defenses as alleged.

The findings of the Court below must be interpreted to be only for the purpose of its deliberating and ruling on the question of sufficiency of the Complaint and the judgment that it must fail on jurisdictional grounds under Rule 12.

The Court having found no jurisdiction, and having dismissed the Complaint, any findings relating thereto are of no further effect since the Court, having no jurisdiction, could not in any way rule on the merits of the case.

Appellants' statement in their Opening Brief quoted above refers to their intent to present evidentiary material on appeal. (i.e., see Appellants' Opening Brief, page 28, lines 18 to 26) Their doing so may have contributed to this Honorable Court's misapprehending of the limitations of the scope of the issue for appeal. Responding briefs of the other parties, in answering Appellants' brief, may have also contributed thereto.

If the Opinion of this Court is to stand, the references on page 6 thereof to a finding that a "taking" occurred on May 8, 1967, and that the action was not commenced until July 31, 1972, may be interpreted as the law of the case. Also, this Court's statement on page 7 that the record shows "an avoidance" of the statutes of limitation is an issue not before this Honorable Court on appeal since the only appealable issue was a judgment of failure of the action on jurisdictional grounds.

All Parties are entitled to present evidence in a trial on the merits on those issues which are obviously issues in dispute. To preclude their opportunity to do so would be a violation of due process vital to adjudication of the issues. County of Clark would be deprived of its day in Court. A substantial miscarriage of justice would result.

Your Petitioner respectfully requests a Rehearing on these points in the interest of modifying the Opinion of the Court so that an evidentiary hearing in a trial on the merits can be had on all disputed issues, on remand.

* * *

Respondent respectfully petitions this Honorable Court for a Rehearing in the interest of protecting its rights of due process on remand and in the interest of promoting justice in this action.

Respectfully submitted,

George E. Holt
District Attorney
By /s/ Melvin R. Whipple
Melvin R. Whipple
Deputy District Attorney
Clark County Courthouse
Las Vegas, Nevada 89101
Attorneys for Respondent

RECEIPT OF A COPY of the above and foregoing PETITION FOR REHEARING is hereby acknowledged this 2nd day of December, 1977.

/s/ George Rudiak/ (illegible)
George Rudiak, Esq.
302 E. Carson Ave., #610
Las Vegas, Nevada 89101
Attorney for Appellants

APPENDIX E

CASE NO. A 77807

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

ARBY W. ALPER and RUTH ALPER,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA,
Defendant.

NOTICE OF APPEAL

(Filed July 3, 1975)

NOTICE IS HEREBY GIVEN that ARBY W. ALPER and RUTH ALPER, Plaintiffs, hereby appeal to the Supreme Court of the State of Nevada from the *Order and Judgment Dismissing Complaint against Clark County,* Defendant, which was made and entered herein on June 5, 1975, and from the whole thereof.

DATED: July 3, 1975.

/s/ George Rudiak
George Rudiak Chartered
302 East Carson, Suite 610
Las Vegas, Nevada
Attorney for Plaintiffs

APPENDIX F

Excerpt of Judge's Decision.

CASE NO. A77807

DEPARTMENT NO. ONE

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

Arby W. Alper and Ruth Alper, Plaintiffs, vs. County of Clark, a political subdivision of the State of Nevada, et al., Defendants.

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE. *REHEARING OF DEFENDANT'S MOTION TO AMEND ANSWER TO ADD 6TH DEFENSE. REHEARING OF COURT'S PRETRIAL CONFERENCE RULINGS THAT THIS ACTION WAS COMMENCED ON JULY 31, 1972 AND REFUSAL TO RULE THAT THE AMENDED SUPPLEMENTAL COMPLAINT FILED HEREIN ON JULY 31, 1972, RELATED BACK UNDER N.R.C.P. 15(c) and 17(a) TO FILING OF THE ORIGINAL COMPLAINT ON MAY 22, 1970.*

Wednesday, May 28, 1975

* * *

THE COURT: I have a personal abhorrence to technicalities, particularly the non-claims statute.

First of all, let me comment about Judge Gang's rulings, and my review of Judge Gang's rulings. If I am convinced that Judge Gang was wrong when he denied the motion to dismiss and when he granted the motion to strike the fifth defense, it would be ludicrous for me to allow the case to go to trial and waste the time of this Court and the time and money of the litigants and attorneys, just so that the case would finally result in a final judgment which could be appealable so that the Supreme Court could reverse it.

Indeed I think that the contention of the non-claims statute is so fundamental as to actually be jurisdictional. It starts out by saying that no person shall sue a County—and that is not a just a condition precedent, I think that that is a jurisdictional requirement that one must meet before one can file a suit.

And I think it is a jurisdictional requirement that one must meet before one can file a suit, it can fit itself within Rule 12(h)3, which says whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

Now, the question—and I realize it seems to be coming late in these proceedings—but the question is whether or not this non-claims statute, 244.245 and 244.250, are then to be applied in an inverse condemnantion action such as this.

As I indicated, I personally abhor non-claim statutes, I think that the comment by the Justice that wrote Turner versus Staggs to the effect that the non-claims statute is a trap for the unwary is most appropriate. Particularly so in tort cases.

If you're injured in an automobile accident and you spend the first six months in a hospital, coming out to get yourself an attorney only to find that it's too late to file

your claim against the County because the six months notice of claim statute has run, it seems basically inherently unfair. But notice of claims statutes do have some salutary effect.

They do give the County notice of the fact that a claim is about to be brought. And an opportunity to, in the case of a personal injury situation, pay the claimant or in another situation to remedy the defect, whatever it might be.

There is less justification for notice of claim statutes in tort cases than in any other single set of cases that I can imagine. Particularly personal injury cases. And I think Turner versus Staggs recognized that.

There is more justification for claim statutes and their use in cases such as this, in inverse condemnation cases. If the claim is filed in an inverse condemnation case, the County knows immediately that it's going to be chargeable for the value of the property.

It can, (a) appraise it; file its own condemnation suit or wait to be sued, but decide immediately whether it's going to pay for it or—and it probably could have been done here—abandon it.

I've listened to an awful lot of argument between the attorneys on this case, and I am now firmly convinced that if the claim had been filed in this case within six months of the May day 1967 when I said that the property was taken, this case would never be here. The County would have stopped immediately and said, "All right, we'll either walk out of it and abandon it right now; we may have to pay damages for a few months for trespass, but that's nominal really; or we'll pay for it"; or probably and more likely knowing the County they would have said, "If you want building permits to do anything on this property,

you're going to have to give fee title to this property—to the strip and convey it to the County."

Certainly before the Bonanza Hotel was built, and certainly before the MGM was built, the County would have required dedication of that strip.

I also note, and I think Mr. Whipple agreed with me when I asked him, that in a tort case and a personal injury case the claims filed with the County are automatically rejected. The County has insurance covering these; the insurance could—I don't know whether it puts the arm on the Commissioners or it's just a working agreement with them, but I have never heard of a personal injury claim that has been accepted. The insurance company handles these.

And the filing of the claim with the Commission is nothing but a perfunctory tradition that you used to have to do. I think that is much more important in an inverse condemnation case.

And in this case there is no excuse for the claim not to have been filed within I believe it's four days of the date of the taking. A letter from Mr. Alper's attorney was forthcoming to I believe it was Mr. Wolf or the Bonanza No. 1 or somebody, talking about the taking of the road.

Mr. Alper was at least at that moment represented by counsel. That was the Wiener letter.

Here's a man who is represented by counsel, and is yelling and screaming about his piece of property being taken for road purposes. He certainly was not that unaware.

Also, at this point in time back in 1967 Turner had not been cited. There was not at that point in time any single decision in the United States holding the notice of claim

statutes unconstitutional. At that point in time, if there was ever an intention to bring a claim against the County for inverse condemnation, any attorney would have advised his client to file the claim against the County.

I'm not at all sure that the original intent was to bring a claim for inverse condemnation. And whether we accept the proposition that the claim for inverse condemnation could have been filed as early as May of 1967, or as late as the date that the lease was cancelled, in either event the claim statute at that point in time—the non-claim statute at that point in time was constitutional, was being used, was upheld.

And at either of those points at least the Alpers were represented by counsel. And as Mr. Morris has observed, they're not entirely ignorant of legal proceedings, although they are not attorneys.

I might also comment on 244.245 and 244.250, as they relate to Chapters 11 and 41.

They are not, as Mr. Whipple has indicated, inextricably intertwined with either of those chapters. I think they stand alone.

Chapter 11, the limitations of actions chapter, uses the point in time that the claim is denied or that it could have been denied as a reference and a starting point of the period of limitation. That doesn't necessarily mean that that particular period of limitation applies in this case.

California has essentially the same circumstance, and yet it does not apply a short period of limitation to an inverse condemnation action.

The City of San Jose is not only a good example, it is a leading case and an extremely persuasive case.

The same thing is necessarily true with Chapter 41. Chapter 41 was enacted by the state to waive sovereign immunity from tort liability; and it was enacted for that very purpose.

There never has been sovereign immunity from inverse condemnation liability. That exists today and it existed the moment our constitution was passed, and it existed if not in our constitution it existed by virtue of the Constitution of the United States of America.

I view the law in Nevada to be essentially the same as it is in California. There's a notice of claim statute.

I don't necessarily believe that the notice of claim statute has the invidious discrimination or carries with it the distinctions that are inherently the problem in Turner versus Staggs. I don't see the tremendous classification and distinction of individuals.

Indeed I doubt that there's any separate classification at all. But there may be.

If there are two separate classes, similar to the ones discussed in Turner versus Staggs, two separate groups of individuals, there may be a valid reason for discriminating in favor of the County, or against—in favor of legal entities in an inverse condemnation proceeding, or in an eminent domain proceeding, which does not exist in a tort situation.

I think that the Court in holding the statute unconstitutional in Turner versus Staggs was really realizing the fact that filing a claim with the County in a tort situation, a personal injury situation, an automobile case, a slip-and-fall case, was just a perfunctory tradition and not necessarily so in condemnation eminent domain proceedings.

This case I am convinced would not be here if it was not for the fact that the Alpers did not file their claims. Or had they filed their claims, it would not be here.

Also, commenting on the argument of estoppel, and particularly the case of Farrell versus Placer County, 145 P.2d 507, in that case which was incidentally a personal injury action, the County advised the plaintiff not to employ counsel, assured her that it would be satisfactory for her to wait until she knew the full extent of her injuries before she had to do anything; I don't view the letter of Mr. Bartley as an intention to waive or as in any way giving the impression to the Alpers that the County was waiving its rights under the non-claim statute.[1]

The Alpers were not led into a sense of false security. The Bartley letter was intended to do exactly that which it said it was doing

They were waiving any claim for a prescriptive easement. It has nothing to do with whether or not the Alpers have a claim for inverse condemnation, and whether if they're going to assert that claim they have to file a notice of claim with the County in the period limited by 244.245.

Talking about the use of non-claim statutes generally, or claim statutes generally, and the constitutional right for compensation after an eminent domain taking without the usual formalities, the Supreme Court of the State of California in City of San Jose, 525 P.2d 701, says that —and I quote—"The claims statutes provisions apply to actions both brought for nuisance and for inverse condemnation. The fact that inverse condemnation was founded directly on the California Constitution, Article I, Section 14, neither excuses plaintiffs from the compliance with the statutes nor renders the claims statutes unconstitutional."

---

1. Italics added for emphasis.

As I indicated, I do have an abhorrence to the technical arguments, particularly the non-claims statutes. But if they have a salutary effect—and I think that they do here—then I think that we should adhere to them.

I don't like the plaintiffs having to lose their case because they didn't comply with a technical defect; but by the same token, had they complied with it I really don't think we would be here today.

I think, and consistent with the San Jose case, an action for a constitutional taking can be subject to reasonable conditions precedent. 244.245 is a condition precedent.

The failure to comply with it leaves us with a jurisdictional defect that cannot be cured. I could require the County to file an amended pleading granting the County leave to assert 244.245 as an affirmative defense and file a motion for summary judgment; hear the motion for summary judgment and grant it; but that seems to me to be the long way around the horn.

I think that the defect is serious enough to be jurisdictional under Rule 12, and I am therefore going to dismiss the plaintiffs' complaint against the County.

* * *

So that I therefore find that there is no just reason to delay the entry of a final judgment in favor of the County, the entry of a final judgment in favor of the clients of Lionel, Sawyer, Collins & Wartman, and the entry of a final judgment in favor of Nathan Jacobson, on first of all the summary judgments with regards to the latter two clients, and my dismissal for lack of subject matter jurisdiction based upon 244.245 with regard to the County; so that these matters can be reviewed in their entirety during the same appeal.

I hope obviously that I have made the right decision. Just in the event that I should not, I think we should clear up a couple of miscellaneous matters.

One being the pretrial order which I have still not signed. Mr. Morris, you've been so active in these proceedings, I would like you to take Mr. Rudiak's pretrial conference order—proposed pretrial conference order, and modify it to include these proceedings on rehearing, and my other rulings; so that there be no question as to how I feel about some of these other matters in case the Supreme Court is interested in them.

Because they may pertain to this to a certain extent. Present it to me as part of this order that I'm entering here today.

APPENDIX G

Office of the
DISTRICT ATTORNEY
COUNTY OF CLARK
Las Vegas, Nevada 89101
Phone 17021 305-3131

George E. Franklin, Jr.
District Attorney

June 19, 1968

Mr. R. B. Alper
Las Vegas, Nevada

Dear Mr. Alper:

The County of Clark recognizes that that part of the northern 50 feet of the Northwest 1/4 of Section 21, Township 21 South, Range 61 East, that is owned by you and is presently being used as a thoroughfare, is being so used by virtue of what is purported to be an Agreement for its use for 52 years executed by Mr. Lawrence P. Wolf and that Vegas Bonanza, Inc., or Mr. Wolf could not give the County any more rights than such grantors actually had or would become entitled to.

The County further recognizes that you have an underlying fee to the property and the County will not contend that because of the continued use of the property as a thoroughfare that any prescriptive right to a street easement can be obtained.

Very truly yours,

/s/ James M. Bartley
James M. Bartley
Chief Civil Deputy

JMB: vmp

APPENDIX H

244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1278

CLARK COUNTY, NEVADA,
Petitioner,

vs.

ARBY W. ALPER AND RUTH ALPER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE RUDIAK
GEORGE RUDIAK, CHARTERED
First National Bank Building
302 East Carson Street, Suite 610
Las Vegas, Nevada 89101
Counsel for Respondents

R. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-6380

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1278

CLARK COUNTY, NEVADA,
Petitioner,
vs.
ARBY W. ALPER AND RUTH ALPER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

I.

STATEMENT OF THE CASE

This is an action for inverse condemnation brought by Respondents, ARBY W. and RUTH ALPER (herein "ALPER") against Petitioner, Clark County, Nevada. The District Court dismissed the action *sua sponte* on the eve of the trial on the ground that Alper's failure to file a claim against the County under the Nevada Claims Statutes, N.R.S. 244.245 and 244.250, precluded suit. The Nevada Supreme Court reversed and remanded for trial on the merits on the ground that the claims statutes should not be construed to apply to actions for inverse condemna-

tion, since to do so would be to impose an unconstitutional impairment upon a right protected under the Fifth Amendment, applicable to the States under the Fourteenth Amendment.

Clark County filed a Petition for Rehearing (Appendix D). Alper responded with an Answer to Petition for Rehearing (Appendix I). The Nevada Supreme Court denied rehearing without opinion (Appendix C). Petitioner seeks review on certiorari of certain language in the opinion of the Nevada Supreme Court which Petitioner claims will deprive it of defenses at the trial through operation of the doctrine of "law of the case".

With the exceptions hereinafter noted, the facts are substantially as set forth in Petitioner's Statement of the Case. However, to place them in proper perspective, we would add the following:

1. The land for the taking of which Alper seeks just compensation is a strip 50′ x 1000′ at the intersection of Flamingo Road and Las Vegas Boulevard, South, one of the busiest corners on the so-called "Las Vegas Strip". By virtue of the taking, the entire 50′ x 1000′ parcel is now part of Flamingo Road, lying immediately in front of the M.G.M. Grand Hotel.

2. Although this land is now part of a public thoroughfare, Alper is still the record owner in fee.

3. Clark County took the land under color of a 52 year easement from Alper's lessee, Bonanza No. 1, knowing that Alper, as owner, was unwilling to dedicate the land to the County.

4. In 1967, when the 52 year easement was so given by the Lessee, the lease had only some five (5) years to

run, but was subject to a 50 year renewal option. The option was never exercised, and in 1969, the lease was cancelled by mutual consent. So the easement under which the County claims some color of right no longer exists.

5. From the time of the taking, Alper, has been completely deprived of the use of any part of his property.

6. Clark County has at no time either compensated, or offered to compensate, Alper for the land so taken.

7. Furthermore, to this very day, Clark County has continued to levy and collect, and Alper has continued to pay, real property taxes upon the full fee value of the land.

8. By its letter dated June 19, 1968, the County recognized Alper's ownership of the fee and stated that "the County will not contend that because of the continued use of the property as a thoroughfare that any prescriptive right to a street easement can be obtained." (Appendix G).

9. Before ruling that the action was barred by the claims statutes, N.R.S. 244.245 and 244.250, the District Court itself recognized that anomalous position in which the County had placed itself, in the following language:

> "THE COURT: Assuming that I was to agree with you, and that the condition precedent to suit applied and that this plaintiff could not continue to pursue this lawsuit, wouldn't we be left in limbo the plaintiff owning bare, naked title, you're still assessing him taxes on it; yet he couldn't sue to recover just compensation for the property taken and you couldn't adversely possess it? What a horrible result. . . ." (Record on Appeal 2546-2547).

II.

HOLDING OF NEVADA SUPREME COURT

In reversing the Judgment of Dismissal and remanding the action for trial on the merits, the Supreme Court of Nevada said:

> "In the instant case it is clear that, if applied to actions of inverse condemnation, N.R.S. 244.245 and 244.250 would be conditions on the right to sue. The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use without payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment and is applicable to the states by way of the Fourteenth Amendment. To impose a requirement of compliance with our claims statutes would allow a state to impose a pre-condition to sue on a federally created and protected right. The imposition of such a prerequisite to sue is an impairment of a Federal right not countenanced by the ruling of the Ninth Circuit in *Willis*. Consequently, if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such applications would, in our opinion, be unconstitutional
>
> "Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right." (A8-A9).

III.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED ON CERTIORARI

A.

Petitioner Is Not Adversely Affected by the State Supreme Court's Decision Since Statements of Fact and Law Contained Therein, Which Were Not Actually Adjudicated, Are Set at Large Upon Remand for Trial on the Merits and Do Not Bind the Parties As the Law of the Case. Consequently, the Petition for a Writ Is Frivolous and Raises No Substantial Federal Question.

The Petition for Certiorari does not attack the principal holding of the Nevada Supreme Court—as quoted above. So, irrespective of what disposition is made of the Petition, it would appear that trial will proceed on the merits to determine what "just compensation" should be paid to ALPER for the taking of his property for public use by CLARK COUNTY. The judgment of the District Court after such trial will again be subject to appeal to the Nevada Supreme Court upon questions of State and Federal law, and, ultimately, to this Honorable Court upon any Federal questions which may be raised and preserved at the trial and appellate level in Nevada.

The Petition for Certiorari addresses itself only to certain collateral "comments, statements, and conclusions" in the Nevada Supreme Court's opinion which Petitioner itself characterizes as "apparent findings of fact-law issues not before the Court on appeal" (page 5 of Petition for Certiorari). Petitioner apprehends that such language in the opinion of the appellate court *may* deprive Petitioner of *possible* defenses at the trial on the merits through operation of the doctrine of "law of the case."

These apprehensions are premature and misconceived, and do not rise to the substantiality required to evoke the discretionary jurisdiction of this Honorable Court upon Certiorari.

In the first place, it is universally held that questions of law not actually adjudicated by the appellate court, either directly or by implication, do not become the "law of the case", even though the appellate court may have made some statements or remarks with respect thereto by way of dictum. *Barney* v. *Winona & St. Peter Ry. Co.*, 117 U.S. 228, 6 S.Ct. 654, 29 L.Ed. 858; *Wm. J. and M. S. Vesey, Inc.* v. *Hillman*, (1972 Ind.) 280 N.E.2d 88, 93; *O'Brien* v. *Great Northern Rd. Co.*, (1966 Mont.) 421 P.2d 710, cert. den. 387 U.S. 920, 18 L.Ed.2d 974, 87 S.Ct. 2034; *Fort Wayne Nat'l Bank* v. *Doctor*, (1871 Ind.) 272 N.E.2d 876; *Webster* v. *Williams*, (1937 S.C.) 194 S.E. 330, 331; *Bryson* v. *Crown Oil Co.*, (1916 Ind.) 112 N.E. 1, 2; *Bates* v. *Smith*, (1966 Cal. App. 5th) 54 Cal. Rptr. 624, 627; *Steelduct Co.* v. *Henger-Seltzer Co.*, (1945 Cal.) 26 Cal. App. 2d 634, 160 P.2d 804, 809; *Moore* v. *Trott*, (1912) 162 Cal. 268, 122 P. 462, 464; 5B C.J.S. 557, Appeal and Error, §1964 (c).

So, in *Barney* v. *Winona & St. Peter Ry., Co.*, supra, this Honorable Court said:

> "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The decision is the law of the case, and must control its disposition; *but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision.*" (Emphasis supplied).

And, in *O'Brien* v. *Great Northern Rd. Co.*, supra, as the Montana Supreme Court aptly observed:

> "The application of the doctrine of 'the law of the case' is limited to those issues which were actually decided and were necessary to the decision. The doctrine does not extend so far as to include matter which was consequential, incidental, or not decided by the Court."

In the Indiana case of *Wm. J. and M. S. Vesey, Inc.*, supra, where, as here, the first appeal was decided before trial on the merits, the Court said:

> "In view of the fact that the first appeal transpired prior to a trial on the merits of this case, we are of the opinion Vesey puts too much of a strain upon what constitutes 'the law of the case'. . . . Only those points decided in the first opinion become the law of the case."

In the second place, the doctrine of law of the case applies only to principles of law laid down by the Court as related to a retrial of the facts, but does not embrace the facts themselves. *Muktarian* v. *Barnby*, (1968 Cal. D.C.A. 5th) 70 Cal. Rptr. 903, 905; *Arkansas State Highway Commission* v. *Lemley*, (1973 Ark.) 497 S.W.2d 680; *Ziolkowski* v. *Cont. Casualty Co.*, (1937 Ill.) 7 N.E.2d 451, 454. So, in *Lemley*, supra, quoting from 5 Am. Jur. 2d §755, the Court said:

> ". . . a decision on appeal on a question of fact does not generally become the law of the case, nor estop the parties on a second trial from showing the true state of facts."

Finally, where, as here, the reversal remands the case for a new trial without specific directions, all issues involved in the case are set at large for readjudication at the new trial, the parties being restored to the same position as though the case had never previously been tried. *People* v. *Lagiss*, (1964 Cal. D.C.A. 1st) 35 Cal. Rptr. 554, 567-568; *Daly* v. *Smith*, (1963 Cal. App.) 220 Cal. App. 2d 592, 33 Cal. Rptr. 920, 925; *Choate* v. *Dept. of Public Health & Welfare*, (1956 C.A. Mo.) 296 S.W.2d 189, 194; *Ziolkowski*, supra. So, neither the "findings of fact and conclusions of law" made by the District Court to memorialize its pre-trial conference rulings on questions of law and fact, nor any facts "found" by the Nevada Supreme Court as the predicate for its decision, would be binding at the trial on the merits.

Consequently, at trial neither party will be bound by the Supreme Court's statement that the trial court had determined "as a matter of law" that the Alper property was "taken" by Clark County in May, 1967, when it entered the Alper land pursuant to the 52 year easement. The County is, therefore, in no way prejudiced by such non-adjudicative statement and, if the same is relevant, will have the opportunity of presenting evidence as to the circumstances surrounding the granting of the easement, and to argue the legal effect of the easement and of the lease termination. Similarly, at trial neither party will be bound by the appellate court's statement that the present action was filed by ALPER on July 31, 1972.[1]

---

1. The record will show that this action was actually commenced on May 22, 1970; that Alper was added as a party by Stipulation and Order on May 5, 1971; and that the original plaintiff was dismissed on Stipulation thereafter. Alper filed his Amended and Supplemental Complaint on July 31, 1972.

B.

The Adjudication of the Nevada Supreme Court That Alper Is Not Precluded From Recovering Just Compensation by Any Applicable Statute of Limitations, Is Properly the Law of the Case.

The holding of the Nevada Supreme Court that Alper is not precluded from recovering just compensation by any applicable Statute of Limitations, because there was an "avoidance" of the statute through the County's letter of June 19, 1968 (Appendix G), stands on a different footing.

The question of whether Alper is barred by either N.R.S. 11.190(5)(b) or N.R.S. 11.220 (Appendix J) was tendered to the Nevada Supreme Court by Clark County as an additional ground why the District Court's Judgment of Dismissal should be upheld. This was done by Clark County over Alper's objection that the Statute of Limitations had not been pleaded and could not be raised for the first time on appeal, especially when the County had not cross-appealed. The entire question as to whether any Statute of Limitations is applicable in Nevada to a claim for inverse condemnation or whether such claim can be extinguished only through an adverse holding by the condemnor for the 5 year holding period required by Nevada law (accompanied by all the other incidents of adverse possession, such as hostile possession under claim of right and payment of taxes (N.R.S. 11.150, N.R.S. 11.160 Appendix K)), was fully briefed by Clark County (Appendix L) and by Alper (Appendix M).

Under these circumstances, it is clear that the Nevada Supreme Court accepted the issue so tendered by Clark County as a proper matter for consideration on appeal, and expressly adjudicated it. In the posture of the case,

such adjudication was presumably necessary because Alper could not be said to be aggrieved by the District Court's dismissal for failure to comply with the claims statutes, if Alper were barred in any event by operation of the Statute of Limitations, and so Alper's appeal would have been rendered moot.

The Supreme Court's cryptic statement that the "record shows an avoidance of the statute" because of the County's letter of June 19, 1968 promising not to assert any prescriptive rights in the property, may therefore be construed either as a holding that the County was estopped by its letter from asserting the bar of the Statute of Limitations, since a prescriptive right is one which arises through operation of the Statute of Limitations, or, it may be construed as a holding that the Clark County's letter evidenced an intention not to claim adversely to Alper, so that the Statute of Limitations could never commence to run.

In either event, the Nevada Supreme Court's conclusion that "appellants are not now barred from proceeding in the instant case" is the law of the case, binding upon Clark County, and properly so, since the County itself tendered this issue to the Court on appeal, the County's letter was before the Court for Judicial interpretation, and the "avoidance" of the statute of limitations through the County's acts was actually and necessarily adjudicated.

In any event, the County is in no way aggrieved by the ruling. At the trial it may urge, as it seeks to urge on certiorari, that such ruling should not be regarded as the law of the case. Should the District Court's decision be adverse, the question may again be raised on appeal to the Nevada Supreme Court after trial. And nothing in the Fourteenth Amendment would preclude the Nevada

Supreme Court from "altering or correcting its interlocutory decision upon a first appeal when the same case, with the same parties, comes before it again." *Moss* v. *Ramey*, 239 U.S. 430, 60 L.Ed. 425, 431 (1915).

C.

The Final Judgment Rule Precludes Review on Certiorari.

28 U.S.C. §1257 limits review by the Supreme Court to "final judgments or decrees rendered by the highest Court of a state in which a decision could be had." The final judgment rule has been said to be the dominant rule in federal appellate practice. *Di Bella* v. *United States*, (1962) 369 U.S. 121, 126, 82 S.Ct. 654, 7 L.Ed.2d 614. It has been suggested that the final judgment rule precludes review "where anything further remains to be determined by a State Court, no matter how dissociated from the only Federal issue that has finally been adjudicated by the highest Court of the State." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124, 89 L.Ed. 2092, 65 S.Ct. 1475 (1945).

It is true that the decisions of this Court have long recognized exceptions to the final judgment rule. However these have generally been limited to such circumstances as were presented in *Forgay* v. *Conrad*, 6 How. 201, 12 L.Ed. 404 (1848), where the state Court judgment required the immediate delivery of property with only an accounting or other ministerial act left pending in the state Court; or where a collateral order, if not subjected to immediate review, would irretrievably destroy the rights of the party seeking the intervention of this Court, as in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). No such circumstances are presented here.

Cox Broadcasting Corp. v. *Cohn,* (1974) 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029, cited by Petitioner, is equally inapposite. For, unlike *Cox,* the Nevada Supreme Court's decision does not cloud "an important question of freedom of the press", nor threaten to "seriously erode federal policy", nor would "reversal of the State Court on the federal issue be preclusive of any further litigation on the relevant cause of action." On the contrary, as already noted, since the principal holding of the Nevada Supreme Court is not under attack, at most, a ruling of this Court reversing the declarations of the Nevada Supreme Court which Petitioner complains of, would merely control the nature and character of further proceedings in Nevada. It would not preclude them.

Moreover, as this Court noted in *Cox,* in most, if not all, of the categories of cases in which the Supreme Court has treated the State Court decision on the federal issue as a final judgment for purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting completion of the additional proceedings pending in the lower state courts, "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." For this very reason, this Court has steadfastly refused to depart from the final judgment rule in eminent domain proceedings, for, as this Court said in *Cox*:

> "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later, 'For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. *A state judgment is not final unless it covers both aspects of that integral problem.*' *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163, 38 L.Ed.2d 379, 94 S.Ct. 407 (1973). See also *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U.S. 251, 256, 61 L.Ed. 702, 37 S.Ct. 295 (1917); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 127, 89 L.Ed. 2092 (1945)." (Emphasis supplied) (43 L.Ed.2d 328, 339).

It is fundamental, of course, that an "inverse condemnation" action is an eminent domain proceeding in reverse where the property owner is obliged to sue for "just compensation" because the public condemnor has defaulted in its constitutional duty. Consequently, a state court judgment in an inverse condemnation action has no finality until both the right of the condemnor to "take for public use" and the "just compensation" to be paid the owner, have been adjudicated. In the case at bar, the Nevada Supreme Court's decision has remanded the cause to the trial Court without instructions, and it is there pending on both issues. Such a judgment is not final and certiorari from such non-final judgment will not lie. The controlling authority is not *Cox,* supra, but *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U.S. 251, 256, 61 L.Ed. 702, 37 S.Ct. 295 (1917) and *Catlin* v. *United States,* 324 U.S. 229, 89 L.Ed. 911, 65 S.Ct. 631 (1945). So, in *Catlin,* supra, this Court said:

> ". . . ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of con-

demnation,' i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded. *Wick* v. *Superior Court*, 278 U.S. 574, 49 S.Ct. 94, 73 L.Ed. 515; Id., 278 U.S. 575, 49 S.Ct. 94, 73 L.Ed. 515; *Public Service Co. of Indiana* v. *City of Lebanon*, 305 U.S. 558, 59 S.Ct. 84, 83 L.Ed. 352; Id., 305 U.S. 671, 59 S.Ct. 143, 83 L.Ed. 435; cf. *Dieckmann* v. *United States*, 7 Cir., 88 F.2d 902. The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *.' *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341, 13 S.Ct. 356, 358, 37 L.Ed. 194. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

Nor is there any legal basis for Clark County's apprehensions that, if denied immediate review by the Court on certiorari, it will be concluded by the Nevada Supreme Court's declarations as the "law of the case." For, as this Court said in *Grays Harbor*, supra:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court (82 Wash. 503), as laying down the law of the case, *this court will not be thus bound.*" (Emphasis supplied) (37 S.Ct. 295, at 297).

D.

As a Political Subdivision of the State of Nevada, Clark County Is Not a "Person" Within the Protection of the "Due Process" Clause of the Fifth Amendment.

It has been a rule of almost universal application that neither a state (*South Carolina* v. *Katzenbach*, (1966) 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803) nor any political subdivisions of a state (*Williams* v. *Eggleston*, (1898) 170 U.S. 304, 18 S.Ct. 617, 619), such as counties or municipalities or municipal corporations, may be regarded as a "person" within the protection of the "due process" clauses of the Federal or State Constitutions. *Warren County* v. *Hester*, (1951) 219 La. 763, 54 So.2d 12, 18; *Bibb County* v. *Hancock*, (1955) 211 Ga. 429, 86 S.E.2d 511; *Shelby* v. *City of Pensacola*, (1933 Fla.) 151 So. 53; *State ex rel. List* v. *County of Douglas*, (1974) 90 Nev. 272, 279, 524 P.2d 1271; *Minnesota State Board of Health* v. *Brainerd*, (1976 Minn.) 241 N.W.2d 624, 633-634; *City of Mountlake Terrace* v. *Wilson*, (1976) 15 Wash. App. 392, 549 P.2d 497, 498 (and cases cited); see also *William* v. *Baltimore*, (1933) 289 U.S. 36 and *Trenton* v. *New Jersey*, (1923) 202 U.S. 182.

In *South Carolina* v. *Katzenbach*, supra, this Court said:

> "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any Court."

Notwithstanding this authority, Petitioner argues that because of the recent erosion of the doctrine of "sovereign immunity" both by judicial and legislative action, and the consequent greater exposure of political subdivisions

to suit, such entities should, in fairness, be accorded procedural due process. If this be so, we respectfully suggest that Petitioner has selected a flimsy vehicle to carry the suggested doctrine before this Court. This is so for two reasons:

First, a suit for inverse condemnation is based upon Constitutional right rather than upon waiver of the doctrine of "Sovereign immunity". Public bodies which fail in their Constitutionally mandated duty to see to the payment of "just compensation" for property taken by them for public use have always been subject to suit by virtue of self-executing provisions of the Constitution. *Rose* v. *State,* (1942 Cal.) 123 P.2d 505, 513. Their exposure to suit has therefore not been increased by the erosion of the "sovereign immunity" doctrine.

Second, it is apparent from what has been said earlier in this brief that Petitioner does not have standing to raise the issue because it has not even colorably been deprived of procedural "due process" by anything contained in the decision of the Nevada Supreme Court or in the denial of its Petition for Rehearing. Since Petitioner has not been denied "due process" under the non-final judgment of the Nevada Supreme Court, and will have ample opportunity for review of any future denial of "due process" in the state trial and appellate court proceedings to follow, as well as by ultimate appeal to the Supreme Court of the United States, the issue is not yet ripe for adjudication.

The minority decisions cited by Petitioner in support of its position that political subdivisions are entitled to "due process" are not persuasive. In *Township of Middletown* v. *Institution District,* (Pa. Commonwealth) 203 A.2d 885, while the court stated that municipal subdivisions are entitled to procedural due process, the language was

clearly dicta, since the court found that the complaining township had had notice and an opportunity to be heard. In *Mensik* v. *Smith,* (1960 Illinois) 18 Ill. 2d 572, 166 N.E.2d 265, 274, it was said that governmental bodies or state agencies are entitled to constitutional guarantees of due process only when their property rights are involved. However, since the court also found that the defendants, as State officers, had no property interest in the matter complained of, this language was also dicta. In *Township of River Vale* v. *Town of Orangetown,* (1968 2nd Cir.) 403 F.2d 684, the Court distinguished the many cases holding that a political subdivision of the State cannot assert rights under the "due process" clause as instances in which the public entity was challenging a law of its own state, and as stemming from the doctrine of *Williams* v. *Eggleston,* supra, that municipal corporations are subject to the control of the legislatures which created them and cannot invoke the constitutional guaranty against the will of their creators. However, we respectfully suggest that since judicial action by the highest court of a state is as much the act of a state as is the action of its legislature, *Shelley* v. *Kraemer,* (1947) 334 U.S. 1, 92 L.Ed. 1161, 1181, the distinction made in *Township of River Vale,* supra, is inapposite. Clark County is no more entitled to invoke "due process" against the judgment of the Supreme Court of Nevada than it would be to invoke the constitutional protection against an Act of the Legislature changing its boundaries.

CONCLUSION

Petitioner has not been denied due process of law by the Nevada Supreme Court's decision, since any expressions on legal issues contained in its opinion not actually

and necessarily decided are not the "law of the case" and will not bind the parties in future proceedings below, and since any facts recited in its opinion remain open to readjudication at the trial. Since Petitioner has not even colorably been denied "due process", it has no standing to raise the contention that, as a political subdivision of the state, it is a "person" entitled to "due process" under the Federal Constitution. Furthermore, Petitioner is precluded by the final-judgment rule from seeking review in the Supreme Court before it has exhausted its trial and appellate remedies in the State Courts.

While Clark County has not been deprived of Constitutional rights, by raising frivolous and unsubstantial issues in its petition for certiorari which cannot under any circumstances be dispositive of the ultimate Federal questions of "taking" and "just compensation" in this inverse condemnation action, Clark County is merely delaying the "due process" and "just compensation" which Alper has been seeking ever since his property was taken for public use in 1967.

The County has not shown the existence of a single ground for issuance of certiorari set forth in Rule 19 of the Rules of the Supreme Court. Its Petition should be denied.

Respectfully submitted,

GEORGE RUDIAK, CHARTERED
By GEORGE RUDIAK
302 East Carson Street, Suite 610
Las Vegas, Nevada 89101
Attorney for Respondents

APPENDIX

APPENDIX I

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellants,
vs.
CLARK COUNTY, NEVADA,
Respondent.

ANSWER TO PETITION FOR REHEARING

George Rudiak Chartered
302 East Carson, Suite 610
Las Vegas, Nevada, 89101
Attorney for Appellants

Lionel Sawyer & Collins
300 So. Fourth Street, #1700
Las Vegas, Nevada, 89101
Attorneys for MGM Grand Hotel (amicus curiae)

George E. Holt, District Attorney
By Melvin R. Whipple, Deputy D.A.
302 East Carson, Suite 405
Las Vegas, Nevada, 89101
Attorney for Respondent

Guild, Hagen & Clark, Ltd.
102 Roff Way
Reno, Nevada, 89501
Attorneys for Nevada Taxpayers' association (amicus curiae)

ANSWER TO PETITION FOR REHEARING

In its Petition for Rehearing, Petitioner, CLARK COUNTY, has not shown itself to be entitled to rehearing upon any of the narrow grounds defined in Rule 40 of the Nevada Rules of Appellate Procedure.

A.

The first five (5) pages of the Petition focus upon the fact that although there was no evidentiary hearing below and the District Court ruled *sua sponte* (albeit, as this Honorable Court has found, erroneously), that it had no jurisdiction to hear this cause because of failure of Appellants to file a claim under *NRS 244.245*, the District Court nevertheless made certain rulings in the form of Findings of Fact and Conclusions of Law (R/A 2680-2685) summarizing its pre-trial conference rulings.

If we understand its argument correctly, the COUNTY claims that some of these preliminary determinations found their way into the statement of facts contained in the briefs of *both* parties (Petition for Rehearing, pg 4, 1.20-25) and "*may have* contributed to this Honorable Court's misapprehending of the limitations of the scope of the issue for appeal". (Ibid., emphasis supplied) The COUNTY also apprehends that some of the facts recited in the Opinion of this Honorable Court, presumably based upon the recitals in the briefs and in the lower court's findings, may become the "law of the case" when this cause is tried upon its merits.

There is no merit in these contentions.

First, the COUNTY has failed to show how, or in what respect, this Honorable Court has misapprehended or exceeded the scope of the issue on appeal, or how the District

Court's Findings (R/A 2680-2685) contributed to such result. The COUNTY itself defines the issue on appeal as "whether or not NRS 244.245 applies to an action for inverse condemnation". (Petition for Rehearing, pg 3, 1.21-22) The Opinion shows that this Honorable Court addressed itself to this precise issue, stating:

> "the principal issue presented is whether NRS 244.245 and NRS 244.250, the Six Months' Claims Statutes, apply to a claim for damages in an inverse condemnation proceeding brought by a property owner against a county."

Responding to this issue, the Opinion holds:

> "if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such application would, in our opinion, be unconstitutional.
>
> "Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation for to do so would deny due process of a constitutionally guaranteed right." (Opinion, pg 6)

Having concluded that the claims statutes do not apply to inverse condemnation claims *at all*, the court found it unnecessary to address itself to the further question, extensively briefed, as to whether the claims statutes *if so applied* would be a denial of equal protection of the laws under its prior decision in *Turner* v. *Staggs* (1973) 89 Nev. 230; 510 P.2d 879, or under such cases as *Tamulion* v. *Michigan State Waterways Commission* (1973 Mich. App.) 212 N.W.2d 828, and *Hunter* v. *North Mason High School* (1975 Wash.) 539 P.2d 845.

Second, Appellants' statement of the fact (fully referenced to the record) was presented at pages 2 to 14 of

Appellants' Opening Brief. Though the COUNTY criticized Appellants' Statement of Facts in general terms, at pages 2 to 7 of its Answering Brief, it restated the facts (without benefit of references to the record) substantially as stated at pages 2 to 14 of Appellants' Opening Brief. Since the parties were in substantial agreement as to the facts, it is not apparent how the court could have been misled by their recital.

Third, there is obviously no merit in the COUNTY's contention that since the District Court found itself to be without jurisdiction and dismissed the action on that ground, it had no authority to make its pre-trial conference rulings. For this Honorable Court has decided that, because the claims statutes are not applicable, and were never applicable, to claims in inverse condemnation, the District Court *did* have jurisdiction of this cause.

Fourth, moreover, the COUNTY's attack on the District Court's pre-trial conference rulings comes both too late, and too early, and provides no basis for rehearing. It is too late, because the point is raised for the first time on rehearing in violation of *Rule 40(c)(1) N.R.A.P.* It is too early because the issue as to the binding effect of the District Court's pre-trial conference rulings can be raised before the District Court when this cause has been remanded for trial on the merits. It provides no basis for rehearing because this Honorable Court did address itself to, and adjudicate, the only part of the District Court's "findings of fact and conclusions of law" which were brought before it on appeal, namely, Conclusions of Law 13, 14, 15, and 16.[1] The remaining portions of the Dis-

1. "13. That NRS 244.245 is constitutional as applied to inverse condemnation actions.

"14. That plaintiffs ALPER did not comply with NRS 244.-245.

(Continued on following page)

trict Court's pre-trial conference rulings, both those which the District Court purported to find as a matter of fact and those which it purported to find as a matter of law, were intended to regulate the trial on the merits, the court having made such rulings before it arrived at its ultimate decision dismissing the action for supposed want of jurisdiction. They were not involved in the issues presented to this Honorable Court on appeal and cannot be said to have been adjudicated in its decision.

Fifth, since this Honorable Court, though it may have referred to some of the "facts" established by the District Court rulings, did not purport to adjudicate them, there is no basis for the COUNTY's apprehensions that such unadjudicated "facts" will become the "law of the case". This is so for two reasons.

1) The doctrine of "law of the case" has been said to apply only to determinations of questions of law and not to questions of fact. Therefore, the doctrine does not estop the parties to a second trial from showing the true state of facts. *5 Am. Jur.2d 198, Appeal & Error, Sec. 755.*

2) The doctrine of "law of the case" applies only to matters actually adjudicated by the appellate court. Thus, it is said in *5B C.J.S. 557, Appeal & Error, Sec. 1964(c)*:

> "Matters which were not decided by the appellate court, directly or by implication, are

Footnote continued—

"15. That NRS 244.245 is a condition precedent to filing suit and is a jurisdictional defect in this proceeding.

"16. That the letter dated June 19, 1968 from James M. Bartley, Chief Civil Deputy District Attorney to R.B. Alper does not create an estoppel against defendant COUNTY OF CLARK to assert 244.245." (R/A 2684-2685)

> not within the operation of the rule that the decision of an appellate court is the law of the case in subsequent proceedings in the same cause; and this is so even though the appellate court may have made some statements or remarks with respect thereto."

Sixth, in view of the above considerations, it can hardly be said—within the meaning of *Rule 40(c)(2)(ii)*—that substantial justice will be promoted by rehearing. Substantial justice does not require this Honorable Court to deal with matters which were not adjudicated in its Opinion. On the contrary, substantial justice requires a prompt remand to the District Court for trial on the merits so that Appellants may be awarded the just compensation guaranteed to them by the Federal and State Constitutions and which has so long eluded them.

B.

Without citing a single authority, the COUNTY next asserts that this Honorable Court has misapprehended the thrust of the effect of so-called "*self-executing* constitutional provisions". (Petition for Rehearing, pg 5, 1.15-26) The argument here is that while self-executing constitutional rights may not be totally abrogated, the manner of their exercise may be reasonably regulated as by statutes of limitation. However, this is merely a re-argument of matters already fully briefed and argued (see Respondent's ANSWERING BRIEF, page 26; and Appellants' REPLY BRIEF, pages 42-43), and therefore, provides no basis for rehearing. (*Rule 40(c)(1) N.R.A.P.*) Besides, the claims statutes are much more than mere statutes of limitations. As pointed out in *Willis* v. *Reddin* (9th Cir, 1969) 418 F.2d 702, cited by this Honorable Court in its Opinion:

> "They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action."

C.

Nor is there any merit to the COUNTY's attempt to show that this Honorable Court has misapprehended or misapplied the holding of the Ninth Circuit in *Willis* v. *Reddin*. While it is true that *Willis* v. *Reddin* involved the question of the right to sue without compliance with a state claims statute in order to vindicate a right arising under the Federal Civil Rights Statutes, the principle there enunciated is not, as the COUNTY asserts, limited in scope to federal statutory right, in general, or personal rights arising under the federal civil rights statute, in particular. Thus, the United States District Court for the Eastern District of California in the unreported case of *The Albert Ellis Radinsky Foundation, Inc.* v. *County of Sierra*, Civil No. 8100 (attached as APPENDIX "H" to Appellants' OPENING BRIEF) applied the principles of *Willis* v. *Reddin* in refusing to permit the California claims statute to bar a suit for inverse condemnation, upon the ground that such a suit is:

> "an action to vindicate the right created and guaranteed by the Fifth Amendment, and applicable to the states by way of the Fourteenth Amendment."

See also:

> *Chicago, B & Q R.R.* v. *City of Chicago* (1897) 166 U.S. 226; 41 L.ed. 979; 17 S.Ct. 581
>
> *Malloy* v. *Hogan* (1963) 378 U.S. 1; 12 L.ed.2d 653; 84 S.Ct. 1489

The correctness of this view can hardly be questioned, for if a state may not impose pre-conditions upon the right to

sue to vindicate a right created by federal statute, how much less may it impose a pre-condition on a right to sue under a right guaranteed by the Federal Constitution. Though not exactly in point, since a state statute was there involved, the observation of Mr. Justice Harlan, concurring in *Monroe* v. *Pape* (1961) 365 U.S. 167, 196; 81 S.Ct. 473, 488; 5 L.ed.2d 492, is nevertheless illuminating:

> ". . . a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

Nor is there any substance to the COUNTY's contention that *Willis* is merely an illustration of *federal* judicial policy binding only upon *federal* courts. For, in its 1976 decision in *Williams* v. *Horvath*, 129 Cal.Rptr. 453; 548 P.2d 1125, the Supreme Court of California, citing *Willis* with approval, held that the California Claims Statute could not be applied to bar the right of a federal civil rights litigant to bring suit *in the state courts* of California for vindication of the federally given right.

D.

Finally, the COUNTY claims that this Honorable Court misapprehended the circumstances and the effect of the COUNTY's June 19, 1968 letter in concluding that as a result of such letter there was an "avoidance" of the statutes of limitations. The COUNTY's contention that Alpers' claim is barred by the statute of limitations was fully briefed (Respondent's ANSWERING BRIEF, pages 25-28; and Appellants' REPLY BRIEF, pages 33-49), and for this reason is not a proper subject for re-argument on rehearing. (*Rule 40(c)(1) N.R.A.P.*) In any event, the COUNTY has not pointed out in what way this Honorable

Court misapprehended the effect of the letter. The COUNTY's June 19, 1968 letter being before the court is certainly a proper subject for judicial interpretation. And, in concluding that the statute of limitations was "avoided" by the letter, it appears to us that this Honorable Court was saying that the COUNTY is estopped by its letter (promising not to assert any prescriptive rights in the property) from asserting such rights by way of the statute of limitations, since a prescriptive right is one which arises through operation of the statute of limitations. Or, this Honorable Court was saying that since the COUNTY's letter renounces any *claim of right* to the property, the statute of limitations could never commence to run. Under either interpretation, it is evident that the correct result was reached and that the only misapprehension is one on the part of the COUNTY.

CONCLUSION

The COUNTY has failed to show any basis for rehearing. Its petition either seeks re-argument upon matters fully briefed and argued by the parties and by *amicus curiae*, or brings up new points raised for the first time on rehearing and not relevant to what was adjudicated by the court. Nor has there been a showing that the court has overlooked or misapprehended any material matter or that substantial justice requires a rehearing. (*Rule 40 N.R.A.P.*)

It is therefore respectfully submitted that the Petition for Rehearing should be denied.

Respectfully submitted,

/s/ George Rudiak
George Rudiak Chartered
Attorney for Appellants
302 E. Carson, Suite 610
Las Vegas, Nevada

APPENDIX J

Nevada Revised Statutes

11.190 Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

11.220 Action for relief not hereinbefore provided for. An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

APPENDIX K

Nevada Revised Statutes

11.150 Additional requirements for adverse possession: Occupation continuously for 5 years; payment of taxes. In no case shall adverse possession be considered established unless it be shown, in addition to the requirements of NRS 11.120 or 11.140, that the land has been occupied and claimed for the period of 5 years, continuously, and that the party or persons, their predecessors and grantors have paid all taxes, state, county and municipal, which may have been levied and assessed against the land for the period mentioned, or have tendered payment thereof.

11.160 Relation of landlord and tenant as affecting adverse possession. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of 5 years from the expiration of the tenancy, or, where there has been no written lease, until the expiration of 5 years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

APPENDIX L

Excerpt From Respondent's Answering Brief

(pages 25 to 28)

Case No. 8412

In the Supreme Court of the state of Nevada

Arby W. Alper and Ruth Alper, Appellants vs. Clark County, Nevada, Respondent

D. REGARDLESS OF WHETHER N.R.S. 244.245 IS APPLICABLE TO THE FACTS OF THIS CASE, N.R.S. 11.190(5)(b), THE ONE YEAR STATUTE OF LIMITATIONS DOES BAR THE MAINTENANCE OF PLAINTIFFS-APPELLANTS' ACTION.

Although claim statutes clearly stand alone on their own merits, they are likewise operable in conjunction with other applicable statutes of limitation. See *Rogers* v. *State*, 85 Nev. 361, at p. 365; 455 P.2d 172 (1969). NRS 11.190 (5)(b) allows one year within which to bring actions or claims against a county, or other political subdivision which have been rejected by the governing body, or after the expiration of time limited for failure to act under NRS 41.036.

The statute clearly covers "*all* actions or claims against the county." (Emphasis supplied) It does not differentiate types of claims or actions and it applies to the facts herein.

There is ample authority that statutes of limitation similar to NRS 11.190(5)(b) do, under proper facts, apply

to actions in inverse condemnation in California (see *Wilson* v. *Beville*, 306 P.2d 789 (1957)) and in many other jurisdictions: *Trippe* v. *Port of New York Authority*, 249 N.Y.S.2d 409 (Ct. App. 1964); *Arkansas State Highway Commission* v. *Montgomery*, 376 S.W.2d 662 (Ark. 1964); *Hot Springs County* v. *Fowler*, 320 S.W.2d 269 (Ark. 1959); *Woods* v. *City of Durham*, 158 S.E. 97 (N.C. 1931); *Stubbs* v. *United States*, 21 F. Supp. 1007 (M.D.N.C. 1938); *Doty* v. *American Telephone and Telegraph Co.*, 130 S.W. 1053 (Tenn. 1910); and *Whoreskey* v. *Old Colony R. Co.*, 53 N.E. 1004 (Mass. 1899).

Legislative policy favors the prompt settlement of property disputes. Adjacent property owners are entitled to reasonable bases for plans and development. The public is served by assurances of reasonable expectations as to public use. To suggest that a claim or dispute of property rights shall remain indefinitely in "limbo" is untenable. Basic rules of law applying to real property are designed to prevent that very problem. The constitutional right advanced by Alper is a property right, not a fundamental personal constitutional guarantee that is forever self-perpetuating. NRS 11.190(5)(b) is abundantly clear on its face, and should be validated unless it suffers from constitutional infirmity.

E. ARGUENDO, IF N.R.S. 11.190(5)(b) SHOULD BE CONSTRUED NOT TO APPLY, THEN N.R.S. 11.220 LIMITING RIGHTS OF ACTION TO FOUR YEARS IS APPLICABLE TO THE FACTS OF THIS ACTION.

Assuming, for purposes of argument only, that the one year statute does not apply, then N.R.S. 11.220 (often referred to as the "catch-all" statute of limitations) *must*

apply to bar Alper's action which Plaintiffs entered into more than five years after the commencement of construction on the widening of Flamingo Road.

The statute provides:

> "*An action for relief, not hereinbefore provided for,* must be commenced within 4 years after the cause of action shall have accrued." (Emphasis added)

In a fundamental holding of long standing, this Honorable Court held in *Nevada* v. *Yellow Jacket Silver Mining Company,* 14 Nev. 220 (1879):

> "Our statute of limitations embraces all characters of actions, both legal and equitable (White v. Sheldon, 4 Nev. 288.) And it may be added, that it embraces *every civil action,* both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033, and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature." (Emphasis added) At p. 230.

APPENDIX M

Excerpt From Appellants' Reply Brief

(pages 32 to 39)

Case No. 8412

In the Supreme Court of the State of Nevada

Arby W. Alper and Ruth Alper, Appellants vs. Clark County, Nevada, Respondent.

D. APPELLANTS' CLAIM FOR INVERSE CONDEMNATION IS NOT BARRED BY EITHER NRS 11.190(5) OR BY NRS 11.220.

Respondent CLARK COUNTY argues that if *NRS 244.245* is not held to apply to ALPER's claim, then *NRS 11.190(5)(b)*—the one year statute of limitations—or *NRS 11.220*—the four year "catch all" statute of limitations, bar the present action. This issue was resolved adversely to CLARK COUNTY by the District Court. (R/A 2126-2128, Conclusion of Law #8, R/A 2684)

Although this action was commenced on May 22, 1970 and an Amended and Supplemental Complaint filed July 31, 1972 (R/A 356-388) CLARK COUNTY failed to plead the Statute of Limitations in its Answer filed January 2, 1973 (R/A 491-497). Twenty-eight months later, on the eve of trial and after ALPER had incurred more than $25,000 in trial preparation, CLARK COUNTY first moved for leave to plead the Statute as a 6th Defense (R/A 1568-1584). The motion was extensively brief (R/A 1586-1603), argued, and denied by the Court (R/A 2126-2128).

Six days before the date fixed for trial, CLARK COUNTY moved for rehearing upon its denied motion, again seeking leave to amend to raise the bar of the Statute of Limitations (R/A 2177-2179). This motion was even more extensively briefed (R/A 2258-2296; R/A 2297-2319; R/A 2320-2336), orally argued, and again denied. The denial was not based upon the untimeliness of the motion (R/A 2128, l. 1-8) but upon the Court's conviction after considering extensive authority that general Statutes of Limitation like *NRS 11.190(5)* and *11.220* do not apply to claims in inverse condemnation, but that such actions may be brought at any time until the owner has lost title by adverse possession with all its incidents, including payment of taxes. (See Appellants' Opening Brief, pp 25-28) The reasons for the Court's refusal to permit amendment to state a Statute of Limitations defense were expressed by the Court in its Conclusion of Law No. 8 (R/A 2684) as follows:

> "8. That Chapter 11 of NRS (Statute of Limitations) does not bar an action for inverse condemnation and that Defendant COUNTY OF CLARK could only prevail on passage of time by complying with all of the requirements of adverse possession and that the Defendant COUNTY OF CLARK did not comply with all of said requirements."

CLARK COUNTY failed to cross-appeal from this adverse ruling, but nevertheless now seeks to support the Judgment on appeal on the theory that even if the District Court wrongly decided that *NRS 244.245* was applicable and constitutional, the Judgment was nevertheless correct in result because Appellant's claim for "just compensation" was barred by the Statute of Limitations. The Amicus Brief of MGM seeks to buttress this unarticulated thesis by citing cases at Page 35 to the effect that a correct

judgment will be affirmed even though decided on the wrong ground.

It is respectfully submitted that (i) CLARK COUNTY has no standing to raise the statute of limitations on appeal; and (ii) if it does, the District Court correctly ruled that *NRS 11.190(5)(b)* and *11.220* are inapplicable.

1. RESPONDENT CLARK COUNTY HAS NO STANDING TO RAISE A STATUTE OF LIMITATIONS DEFENSE ON APPEAL WHERE THE DISTRICT COURT REFUSED TO PERMIT AMENDMENT OF ITS ANSWER TO PLEAD SUCH DEFENSE AND RESPONDENT FAILED TO CROSS-APPEAL.

In *Dennis* v. *Caughlin*, 22 Nev. 447, 453, citing its own earlier decisions in *Maher* v. *Swift*, 14 Nev. 324, and *Moresi* v. *Swift*, 15 Nev. 215, and several California decisions, this Hon. Court stated:

> "It has frequently been decided that a party who has not appealed from a judgment cannot, on appeal by the opposite party, obtain a review of the rulings of the court against him. Our conclusion is that only such errors as the appellant complains of can be considered upon this appeal."

Although in the later case of *Leonard* v. *Bowler*, 72 Nev. 165 this Honorable Court indicated that "in a proper case and in the exercise of its discretion" the Court would "consider cross-assignments of error made by the respondent", and in *Alper* v. *Western Motels*, 84 Nev. 472, it corrected a minor error on cross-assignment *where Appellants did not object*, in *Alamo Irrigation Co.* v. *U.S.*, 81 Nev. 390 (1965) this Court re-affirmed the principle of *Dennis* v. *Caughlin*, supra, and declined to consider a respondent's cross-assignment of error, saying:

> "These objections are not properly before this court. Respondent did not cross-appeal, but filed a cross-assignment of error only as to the issue of laches. Generally errors affecting a party who does not appeal will not be reviewed (cites omitted) . . In this case we do not choose to review the objections of the respondent because they were not raised by a cross-appeal and will not now be considered by the court."

It is evident, therefore, that although this Honorable Court has discretion to consider a cross-assignment of error it will rarely undertake to do so. Since adoption of the Nevada Rules of Appellate Procedure in 1973, less reason exists than ever before for entertaining a cross-assignment of error, since Rule 4(a) now allows a respondent 14 days after the filing of a timely notice of appeal by appellant within which to cross-appeal.

In a factual context almost on all fours with that of the case at bar, a Federal Court, declined to review the bar of the statute of limitations, pressed by the Respondent in support of the summary judgment granted by the District Court, because Respondent had not cross-appealed on this issue. Thus, in *Tallman* v. *Udall* (CA DC 1963) 324 F.(2d) 411, reversed on other grounds (1965) 380 U.S. 85 S.Ct. 792; 13 L.Ed.(2d) 616, the defendant moved for summary judgment (1) on the merits, and (2) on the ground that the claim was barred by the statute of limitations. The District Court granted summary judgment on the merits, but expressly rejected the statute of limitations defense, just as Judge Thompson did in the instant case. The appellate court reversed. Although the opinion considered and rejected the statute of limitations defense, two of the three judges concurred to express the view that the limitations issue was not properly before the court because of the Respondent's failure to cross-appeal, saying:

> "It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may as here be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

The view of the concurring judges was cited with approval in *United States ex rel Townsend* v. *Ogilview* (CA 7th, 1964) 334 F.(2d) 837, 842 cert denied (1965) 379 U.S. 984; 85 S.Ct. 683; 13 L.Ed.(2d) 574. See also *Wisconsin Bankers Assn* v. *Robertson* (CA DC 1961) 294 F. (2d) 714, cert denied (1961) 368 U.S. 938; 82 S.Ct. 381; 7 L.Ed. (2d) 383; and *Rhoads* v. *Ford Motor Co.* (CA 3d 1975) 514 F.(2d) 931, the latter stating that filing of a protective cross-appeal is the "better practice".

Even more significantly, the Statute of Limitations defense, like all affirmative defenses, is required under NRCP 8(c) to be affirmatively pleaded, and, when not so pleaded, such defenses are waived.

> *Chisholm* v. *Redfield*, (1959) 75 Nev. 502, 508 (statute of frauds)

Ray Motor Lodge, Inc. v. *Shatz,* (1964) 80 Nev. 144, 117, fn.2

Carter v. *Barabash,* (1966) 82 Nev. 289, 292

Marschall v. *City of Carson,* (1970) 86 Nev. 107, 111

Although the Nevada cases cited above all involved waiver of the Statute of Frauds through failure to plead the same as required by *NRCP 8(c) and 12(b),* the same rule has been universally applied in Nevada and elsewhere to failure to plead the Statute of Limitations.

Woodstock v. *Whitaker,* (1962) 62 Nev. 224

Barr v. *Petzhold,* (1954 Ariz) 273 P. (2d) 161

Hall v. *Chamberlain,* (1948 Cal) 192 P. (2d) 750

Sheeter v. *Lifur,* (1952 Cal.App.2d) 249 P. (2d) 336, 342

Rivera v. *Johnston,* (1951 Ida) 225 P. (2d) 858

Marks v. *McCune Construction Co.,* (1962 Okla) 370 P. (2d) 560, 562

Oklahoma City v. *Local Fed. Sav. & Loan,* (1943 Okla) 134 P. 2d 565

Chavez v. *Kitsch,* (1962 N.M.) 374 P. (2d) 497

Darling v. *Christensen,* (1941 Or) 109 P. (2d) 58

Boyle v. *Clark,* (1955 Wash) 287 P. (2d) 1006

It is also noteworthy that the doctrine of waiver through failure to plead the Statute of Limitations has been frequently applied to public bodies, sometimes in the context of condemnation proceedings.

Mitchell v. *County Sanitation Dist.,* (1957 Cal App) 309 P. (2d) 930

Keeter v. *Board of County Commissioners,* (1960 N.M.) 354 P. (2d) 135

Butte Country Club v. *Metropolitan San. Dist.,* (1974

Coray v. *Hom,* (1964) 80 Nev. 39, 41

Mont) 519 P. (2d) 408

So, in *Mitchell* v. *County Sanitation District,* supra, after reviewing the authorities, the California Court of Appeals said:

> "Suffice it to say that we understand the rule to be that the defense of the statute of limitations, even as to a public body, is waived unless the question or defense is raised by demurrer or answer." (309 P. (2d) 930, 933)

Furthermore, it has been held that when an affirmative defense like the statute of limitations is not pleaded, it may not be raised for the first time by exceptions to findings of fact and conclusions of law after rendition of judgment. (*Oklahoma City* v. *Local Federal Savings & Loan,* supra) And, it is generally agreed that when not pleaded below, the Statute of Limitations may not be raised or considered on appeal.

Marks v. *McCune Construction Co.,* supra

Sheeter v. *Lifur,* supra

Keeter v. *Board of County Commissioners,* supra

Had the District Court permitted CLARK COUNTY to amend and raise the defense of the Statute of Limitations, or had CLARK COUNTY cross-appealed from the adverse ruling on this point, it is conceivable that CLARK COUNTY could urge the Statute in support of the Judgment. But where CLARK COUNTY waived the Statute in the first instance by failing to plead it, and then failed to cross-appeal from the ruling denying it leave to plead the Statute as a defense, it lost whatever right it had to raise such defense in this action, either below or before this Court. The defense of Statute of Limitations is simply not part of this case. And since, on this state of the record, CLARK COUNTY could not have won below on the bar of the Statute—even if such defense would other-

wise have been proper—and since it did not cross-appeal the ruling denying it leave to amend, it seems self-evident that CLARK COUNTY may not now bootstrap itself to raise the waived defense by urging it in support of a judgment decided on different grounds.[10]

2. GENERAL LIMITATIONS STATUTES LIKE NRS 11.190(5) AND NRS 11.220, DO NOT APPLY TO INVERSE CONDEMNATION SUITS, WHICH MAY BE BROUGHT AT ANY TIME UNTIL THE OWNER'S TITLE HAS BEEN LOST THROUGH ADVERSE POSSESSION BY THE CONDEMNOR, INCLUDING ALL THE INCIDENTS OF ADVERSE POSSESSION SUCH AS PAYMENT OF TAXES.

Turning now to the merits, CLARK COUNTY argues that if *NRS 244.245* is not held to apply to ALPER's claim, or is held unconstitutional as applied to ALPER's claim, then *NRS 11.190(5)(b)*, the one year statute of limitations; or *NRS 11.220*, the four year catch-all statute of limitations bars the present action. As noted above, the issue was raised in District Court by CLARK COUNTY in its motion for leave to file a Sixth Defense asserting the statute of limitations as a bar to ALPER's claim. District Judge Thompson denied the motion because, as a matter of law, in the absence of a special statute of limitations in Nevada applicable to inverse condemnation actions as such, general limitation statutes like those found in NRS Chapter 11, do not apply

10. Nor is CLARK COUNTY aided by the fact that it sought to raise the defense in the lower court by amendment, and that its motion was denied. In *Alamo Irrigation Co.*, supra, the respondent similarly raised certain objections before the lower court and was overruled, but since respondent did not cross-appeal, this Court refused to consider its cross-assignments of error.

to suits in inverse condemnation, which are regarded as *sui generis*, neither "actions at law" or "suits in equity" but "special proceedings".

Oklahoma City v. *Wells*, supra, at 1082-1083

Aylmore v. *City of Seattle*, (1918 Wash) 171 P. 65

Salt Lake Inv. Co. v. *Oregon Short Line R. Co.*, (1914 Utah) 148 P. 439

Faulk v. *Missouri River & N.W. R. Co.*, (1911 S.D.) 132 N.W. 233

Nichols on Eminent Domain, Sec. 4.102.5

In fact, the better and majority view is that, in the absence of special statutes of limitations expressly applicable by their terms to inverse condemnation actions, suits in inverse condemnation may be brought at any time until the owner has lost title to the land taken through adverse possession by the condemnor for the statutory period. See *Aylmore* v. *City of Seattle*, supra, and other cases cited at page 26 of Appellants' Opening Brief.

Moreover, it is universally held that it is not the mere passage of time which divests the owner of his right to seek "just compensation" but loss of title to his land through actual adverse holding by the condemnor for the statutory period together with all the usual incidents of adverse-possession, such as the requirements that it be hostile, under good faith claim of right or color of title that it be open and notorious, and accompanied by payment of taxes. Such requirements are held to apply as fully where the adverse possessor is a public body as when it is a private individual.

Hamilton v. *McCall* (1965 Ida) 409 P. (2d) 393

State Road Commission v. *Cox Corp.* (1973 Utah) 506 P. (2d) 54

See Page 27 of Appellants' Opening Brief for other cases.[11]

Of course, if the County desired to obtain title to ALPER's land by adverse possession, it could have dispensed with the requirement for payment of taxes by ceasing to levy them. *City of Gilroy* v. *Kell* (1924 Cal) 228 P. 400. But, as the District Court found[12] CLARK COUNTY has continued to levy and collect taxes on the Alper land to the present time. Consequently, by levying taxes, CLARK COUNTY recognized Alper's title and its holding was not adverse to his title and CLARK COUNTY therefore could never acquire title by adverse possession so as to bar Alper from asserting his claim for "just compensation".

Hamilton v. *McCall*, supra

State Road Commission v. *Cox Corp.*, supra

See also *People's Water Co.* v. *Boromea* (1916) Cal. App) 160 P. 574

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In fact, under one respectable line of authority, stemming from the U.S. Supreme Court, a public body may never acquire title—notwithstanding entry and possession—until just compensation is determined and paid.

Kennedy v. *Indianapolis*, 103 U.S. 599; 26 L.Ed 550

Cherokee Nation v. *Southern Kan.Ry.Co.* (1890) 135 U.S. 641

So, in *Cherokee Nation*, the rule was stated as follows:

". . . by the terms of the act of congress, the title to the property appropriated passed from the owner

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11. The law as summarized in the preceding paragraphs was clearly adopted by the District Court. (See R/A 1967, 1.27 to 1968, 1.24; R/A 2622, 1.8-29; Conclusion of Law No. 8, R/A 2684)

12. See R/A 1998, 1.3-23; R/A 2000, 1.3-16.

to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land pending the appeal, and to proceed in the construction of its road. *But clearly the title does not pass until compensation is actually made to the owner; within the meaning of the constitution the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.* Such was the decision in Kennedy v. Indianapolis, 103 U.S. 599, 604, where the court construed a clause of the constitution of Indiana declaring that no man's property 'shall be taken or applied to public use * * * without a just compensation being made therefor,—substantially the provision found in the national constitution. This court there said that, *'on principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter on and use the proporty is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.'"* (emphasis supplied) 135 U.S. at 660

So, since the property "is not *taken* until compensation is ascertained in some legal mode, and, being paid, the title passes from the owner," it is arguable that—at least absent a special statute of limitations applicable specifically to inverse condemnation claims—Alper's property has never been *"taken"* so as to start a statute of limitations running. Or, put in another way:

"It has been held that where the constitution, either expressly or as interpreted by the courts, requires compensation to be first made for property taken for public use, *a law which casts the initiative*

> *upon the owner and requires him to prosecute his claim for compensation within a time limited, or be barred, is invalid,* and that when, under such a constitution, property is appropriated to public use without complying therewith, the owner may (although laches may estop him from recovering possession) maintain an action for compensation at any time before he has lost title by the appropriator's adverse possession. (emphasis supplied) *27 Am.Jur. (2d) Eminent Domain, Sec. 498*

However, to reach the same result, we need not go as far as the Supreme Court did in *Cherokee Nation,* or as far as the authorities which hold that a constitutional claim for compensation *may not be barred by any statute of limitations.* We need only point out that in Nevada there is no specific statute of limitations applicable to inverse condemnation claims, that under the authorities above cited, general statutes of limitation like those set forth in Chapter 11 NRS do not apply to claims in inverse condemnation, and that CLARK COUNTY has not —and cannot—extinguish Alper's claim for "just compensation" through adverse possession for two equally cogent reasons:

> *First,* because CLARK COUNTY is still assessing, and ALPER is still paying taxes on the property. (R/A 1990, 1.3-23; R/A 2000, 1.3-10)
>
> *Second,* because as the District Court found, CLARK COUNTY is estopped from ever claiming a prescriptive title against ALPER by virtue of the Bartley letter, P's Exh. 28, quoted at pp 6-7 of Appellants' Opening Brief. (R/A 1970, 1.24-27; R/A 1984, 1.13-18; R/A 2646, 1.24-28)

CLARK COUNTY cites authorities that have applied statutes of limitations to inverse condemnation actions under certain circumstances.[13] One line of authorities on which CLARK COUNTY relies involve cases in which the statute gives the landowner a specified period of time *after notice of a condemnation order* to bring his claim for compensation.

> *Hot Springs County* v. *Fowler* (1959 Ark) 320 S.W. (2d) 269
>
> *Arkansas State Highway Commission* v. *O.T. Montgomery* (1964 Ark) 376 S.W. (2d) 662
>
> *Whoreskey* v. *Old Colony R. Co.* (1899 Mass) 53 N.E. 1004

However, we have no comparable statute in Nevada (R/A 1951, 1.16-19), and if we had, it would surely be inapplicable to an inverse condemnation claim which arises because the condemning authority failed to follow the statutory condemnation proceeding. For here, there was *neither a condemnation order nor a condemnation proceeding.* The cases cited are therefore inapposite.

The other cases cited by CLARK COUNTY involve special statutes of limitation where there has been a taking for public use without a condemnation proceeding or order and the statute expressly allows the property owner to sue for "just compensation" within a specified period of time after the taking.

> *Stubbs* v. *United States* (1938 DC NC) 21 F.Supp 1007 (Tucker Act case)

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13. We are completely at a loss to understand why CLARK COUNTY has cited *Wilson* v. *Beville,* supra, to this point, since, as already noted, *Beville* is strong authority that compliance with claims statutes is not required in inverse condemnation proceedings.

Woods v. *City of Durham* (1931 NC) 158 S.E. 97

Doty v. *American Telephone & Telegraph Co.* (1910 Tenn) 130 S.W. 1053

Trippe v. *Port of New York* (1964 NY) 249 N.Y.S. (2d) 409

However, as we have already noted, in Nevada we have no special statute of limitations for inverse condemnation suits. And, in the absence of such special statutes, the general statutes of limitation like *NRS 11.190(5)(b)* and *NRS 11.220* are held inapplicable.

Oklahoma City v. *Wells* (1939 Okla) 91 P. (2d) 1077; 123 A.L.R. 662; and Annotation at 123 A.L.R. 676

See particularly cases cited at *123 A.L.R. 679 to 683.*

Furthermore, to cite *NRS 11.190(5)(b)* as a bar to this action is to beg the question. For whether *NRS 11.190(5)(b)*—requiring claims and actions against counties and other public bodies "which have been rejected" to be brought within one year "after the first rejection thereof" —is clearly dependent upon whether it was necessary to present such a claim to CLARK COUNTY in the first place by virtue of *NRS 244.245*. If compliance with *NRS 244.245* was unnecessary for the reasons Appellants have assigned, then *NRS 11.190(5)(b)* would be inapplicable by its own terms, since there would have been no claim presentation and no rejection of the same. On the other hand, if *NRS 244.245* is a bar, then ALPER being already precluded from suit by non-compliance with a condition precedent, the bar of *NRS 11.190(5)(b)* becomes moot.

In support of its contention that *NRS 11.220* (the 4 year "catch-all") statute bars ALPER's claim CLARK COUNTY cites the early decision of this Court in *Nevada* v. *Yellow Jacket Silver Mining Company* (1879) 14 Nev.

220. In *Yellow Jacket*, the Supreme Court held that C.L. 1033 (the predecessor of *NRS 11.220*) applies to "every civil action, both legal and equitable". However, in *Yellow Jacket*, the Court was not determining the applicability of the "catch-all" statute of limitations in a suit for constitutional compensation under the self-executing provisions of the State Constitution, but only to an action by the State of Nevada under its general revenue laws. Moreover, we need hardly again reiterate that an inverse condemnation suit is neither a "legal action" nor an "equitable action", but rather a "special proceeding" to which the "catch-all" limitation statutes have been held to have no application.

Oklahoma City v. *Wells*, supra

Harley v. *Keokuk & N.W. R. Co.* (1892 Ia) 52 N.W. 352

Salt Lake Invest. Co. v. *Oregon Short Line R. Co.*, supra

So, when the Nevada Supreme Court, almost 100 years ago, spoke of the "catch-all" statute of limitations as being applicable to "every civil action, both legal and equitable", it is evident that it was not considering the effect of such a statute upon a suit brought under the self-executing provisions of the Nevada Constitution which require that "just compensation" be *first paid* before private property is taken for public use. For these reasons, *Yellow Jacket* is inapposite.

Under the above authorities, ALPER respectfully submits that the District Court correctly found that neither *NRS 11.190(5)(b)* nor *NRS 11.220* are applicable in a suit for inverse condemnation, and that CLARK COUNTY has not obtained title to Alper's land by adverse possession and is estopped from doing so by its action in continuing to assess taxes and by ALPER's reliance on the Bartley letter.

Should this Honorable Court hold *NRS 11.220* applicable, this would by no means necessitate affirmance of the Judgment below, which was rendered *sua sponte*, without motion for summary judgment or evidentiary hearing. Such a ruling by this Court would merely open a number of other questions for determination upon their facts and the applicable law. For, even if we assume that *NRS 11.220*, the 4 year catch-all statute applies, and even if we grant that CLARK COUNTY commenced construction of Flamingo Road over ALPER's land on May 8, 1967 —since this action was commenced on May 22, 1970 (R/A 1), on its face it would appear that this action was commenced well within such four year period.

The four year catch-all statute only becomes significant, therefore, because the District Court held in its Finding of Fact No. 5 (R/A 2682) that ALPER only became a party to this proceeding on July 31, 1972 when the Amended and Supplemental Complaint was filed, and that such pleading does not relate back to May 22, 1970 when ALPER's predecessor, Ross, filed this action, because the original Complaint filed by Ross was a nullity. In reaching this startling conclusion, the District Court reasoned that because the Federal Court in Case No. 1320 had found that the conveyance from ALPER to Ross was "feigned and sham" for the purpose of conferring diversity jurisdiction upon the Federal Court, at the time Ross commenced this action, ALPER was the "real party in interest" and the Complaint filed by Ross was *nudum pactum*.

Although ALPER sought and was granted a rehearing upon this question, which was thoroughly briefed (R/A 2320-2336), the District Court found it unnecessary to rehear and decide this question because of its ruling that the action was barred by *NRS 244.245*. So, the tentative

finding stands, although Alper respectfully submits that it is palpably erroneous.

6 Wright & Miller, Federal Practice and Procedure, #1557

Kramer v. *Caribbean Mills, Inc.* (1969) 394 U.S. 823; 89 S.Ct. 1487

Castleman v. *Redford* (1942) 69 Nev. 259; 124 P. (2d) 293

Withers v. *Rockland Mines Co.* (1937) 58 Nev. 98; 71 P. (2d) 156

Carpenter v. *Johnson*, 1 Nev. 331, 332

Ray v. *Hawkins* (1960) 76 Nev. 164; 350 P. (2d) 998 (holding that the party who holds legal title is the "real party in interest and has standing to sue")

Moreover, Finding of Fact No. 5 disregards the fact that ALPER was *added* as a party plaintiff on May 5, 1971 *by stipulation and order* (R/A 1617, 1619) and that under *NRCP 17(a)* ALPER's joinder had "the same effect as if the action had been commenced in the name of the real party in interest" so that by virtue of *NRCP 17(a)* and *NRCP 15(c)* there would be a relation back.

Janis v. *Kansas Electric Power Co.* (1951 USDC Kans) 99 F.Supp. 88

Wallis v. *United States* (1952 USDC) 102 F.Supp. 211

Finding of Fact No. 5 also disregards the fact that CLARK COUNTY had notice of the general nature of the claim made by Ross and ALPER (as the "real party in interest"), and of the transaction from which it arose, from the Complaint in Case No. 1320, the Complaint herein, the Amended and Supplemental Complaint filed herein on August 23, 1971 (R/A 156-187) (which was ordered stricken on a

procedural point) as well as from the Amended and Supplemental Complaint filed July 31, 1972 (R/A 356-388). Since CLARK COUNTY had fair notice throughout of the general nature of the claims being asserted so that it could prepare to defend against them, it is generally held that the relation back doctrine of *NRCP 15*(c) will be applied and there is no reason to bar the claim through operation of the intervening bar of the statute of limitations.

Kreiger v. *Village of Carpentersville* (1972 Ill) 289 N.W. (2d) 481

Tobias v. *Kessler* (1963) 239 N.Y.S. (2d) 554, 556

Compare *Rogers* v. *State* (1969) 85 Nev. 361, 365

Here again, if this Honorable Court agrees with ALPER's analysis and holds Finding of Fact No. 5 to be erroneous, *NRS 11.220* becomes moot, for the action was clearly commenced within 4 years from the time CLARK COUNTY started to build Flamingo Road over ALPER's property. However, if this Honorable Court disagrees, that does not necessarily end the matter. For we are then faced with a number of perplexing questions, some of which could only be resolved upon an evidentiary hearing:

1. Where the County entered under a purported "52 year easement" from ALPER's lessee, was its holding in subordination to ALPER's rights so that its entry was not a "taking" until the lease was terminated on January 16, 1969?

Gentleman v. *Soule* (1963, Ill) 83 Am.Dec. 264

Newhoff v. *Mayo*, 48 N.J.Eq. 619; 23 A. 265

Automotive Products Corp. v. *Provo* (1972 Utah) 502 P. (2d) 568

2 Thompson on Real Property, Easements, Sec. 317 at pp 26 and 28

Reno Brewing Co. v. *Packard* (1909) 31 Nev. 433

McDonald v. *Fox* (1889) 20 Nev. 364, 368

City of Des Plaines v. *Boeckenhauer* (1943 Ill) 50 N.E. (2d) 479, 482

2. For the same reasons, did ALPER have the right to assume that CLARK COUNTY had not "taken" his land until it was brought home to him in July 1969 that, despite the assurances contained in the Bartley letter of June 1968 (P's Exh. 28), CLARK COUNTY had entered into an agreement with Jacobson and Bonanza No. 2 to resist ALPER's claims to his land? (R/A 383-388)

3. If so, did the "taking" which started the statute of limitations running occur when the lease under which the County entered terminate on January 16, 1969, or when ALPER first became aware of CLARK COUNTY's intent to permanently appropriate his land?

4. Where ALPER, though the owner, was out of possession at the time of the taking because he had leased the property for a term of years, was his action for "just compensation" under the Constitution postponed until he regained possession of the property?

Rhoda v. *Alameda County* (1933 Cal.App.) 26 P. (2d) 691, 694

Potrero Nuevo Land Co. v. *All Persons* (1916) 29 Cal.App. 743; 156 P. 876

Thompson v. *Pacific Electric R. Co.* (1928) 203 Cal. 578; 265 P. 220

Stephenson v. *Cavendish* (W.Va.) 59 S.E.(2d) 459; 19 A.L.R. (2d) 720

Mosesian v. *Fresno County* (1972 CA 2d) 104 Cal. Rptr. 655

5. Where the leased land, including the portion in the physical possession of CLARK COUNTY, was legally in the possession of the Bankruptcy Court, and ALPER was precluded from regaining possession by a Bankruptcy Stay Order, since "just compensation" is the constitutional equivalent of the land, was operation of any Statute of Limitations for recovery of "just compensation" tolled by virtue of *11 U.S.C.A. 791 and NRS 11.350*?

St. Paul, M & M. Ry. Co. v. *Olson* (1902 Minn) 91 N.W. 294

Fortunately, we do not believe it will be necessary for the Court to reach these questions, or to remand the cause for their further adjudication below, because under the authorities cited, it seems quite clear that (1) CLARK COUNTY has no standing to raise the statute of limitations question upon this appeal; and (2) in any event, since the general statutes of limitations set forth in NRS Chapter 11 are inapplicable to a suit in inverse condemnation, such action is not barred unless and until the owner loses title through adverse possession.

CONCLUSION

ALPER respectfully submits that his action to recover "just compensation" for valuable property of which he remains the record owner, and upon which he is being taxed, but of the use of which he has been deprived by a taking for public use, is not barred by *NRS 244.245*

or, if so barred, that *NRS 244.245* deprives ALPER of equal protection of the laws in violation of the State and Federal Constitutions, and that this Honorable Court should so declare.

Respectfully submitted,

/s/ George Rudiak
George Rudiak Chartered
Attorney for Appellants
302 East Carson, Suite 610
Las Vegas, Nevada, 89101